Supreme Court, U.S.
FILED

APR 02 2004

No. 03-031397

IN THE

Supreme Court of the United States

CHRIST CENTER, CHRISTIAN COVENANT OUTREACH CHURCH, HIS WORD MINISTRIES TO ALL NATIONS, CHRISTIAN BIBLE CHURCH, MONTE DE SION (MOUNT ZION) CHURCH, AND CIVIL LIBERTIES FOR URBAN BELIEVERS,

Petitioners,

v.

CITY OF CHICAGO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

JOHN W. MAUCK
RICHARD S. BELL
MAUCK & BAKER
Suite 2001
One North LaSalle Street
Chicago, Illinois 60602
(312) 726-1243

CARTER G. PHILLIPS
GENE C. SCHAERR*
REBECCA K. WOOD
DAVID S. PETRON
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

Counsel for Petitioners

* Counsel of Record

April 2, 2004

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Whether an equal protection challenge to a land-use regulation that implicates uses protected by the First Amendment, such as religious uses, must be analyzed under the same "rational basis" scrutiny as economic regulations implicating no fundamental rights or sensitive uses.

2. Whether government regulation must make religious uses or practices "effectively impracticable," or merely significantly more difficult, to constitute a "substantial burden" on religion for purposes of the Free Exercise Clause or the Religious Land Use and Institutionalized Persons Act of 2000.

STATEMENT REQUIRED BY RULES 14.1 AND 29.6

Pursuant to Supreme Court Rule 14.1, petitioners state that all parties to the proceeding in the court whose judgment is sought to be reviewed are included in the caption. Petitioner Christ Center is currently known as Christ Worship Center International. The United States of America intervened below to defend the constitutionality of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc *et seq.*

Pursuant to Supreme Court Rule 29.6, petitioners state that they are not nongovernmental corporations from which corporate disclosure statements are required.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
STATEMENT REQUIRED BY RULES 14.1 AND 29.6	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	9
I. THIS COURT'S REVIEW IS NEEDED TO DETERMINE THE PROPER STANDARD FOR ASSESSING AN EQUAL-PROTECTION CHALLENGE TO A LAW THAT DISCRIMINATES AGAINST AND AMONG RELIGIOUS USES	10
II. THIS COURT'S REVIEW IS NEEDED TO RESOLVE A CONFLICT OVER THE PROPER STANDARD FOR DETERMINING WHEN A LAW IMPOSES A "SUBSTANTIAL BURDEN" ON RELIGION FOR PURPOSES OF THE FREE EXERCISE CLAUSE AND RLUIPA	19
CONCLUSION	26

TABLE OF AUTHORITIES

CASES Page

Axson-Flynn v. *Johnson*, 356 F.3d 1277 (10th Cir. 2004) 18, 23
Ball v. *Massanari*, 254 F.3d 817 (9th Cir. 2001) 14
Bower v. *Village of Mount Sterling*, 44 Fed. Appx. 670 (6th Cir. 2002) 14
Brown v. *Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525 (1st Cir. 1995) 17
Christian Gospel Church v. *City & County of S.F.*, 896 F.2d 1221 (9th Cir. 1990) 20
Church of the Lukumi Babalu Aye, Inc. v. *City of Hialeah*, 508 U.S. 520 (1993) 16, 23
City Chapel Evangelical Free Inc. v. *City of South Bend ex rel. Dep't of Redev.*, 744 N.E.2d 443 (Ind. 2001) 17
City of Cleburne v. *Cleburne Living Ctr.*, 473 U.S. 432 (1985) ..... *passim*
City of New Orleans v. *Dukes*, 427 U.S. 297 (1976) 14
Congregation Kol Ami v. *Abington Township*, 309 F.3d 120 (3d Cir. 2002) 12
Cornerstone Bible Church v. *City of Hastings*, 948 F.2d 464 (8th Cir. 1991) 11
Employment Div. v. *Smith*, 494 U.S. 872 (1990) 7, 16, 23
First Covenant Church v. *City of Seattle*, 840 P.2d 174 (Wash. 1992) 22, 24
Fraternal Order of Police Newark Lodge No. 12 v. *City of Newark*, 170 F.3d 359 (3d Cir. 1999) 24
Gaylor v. *United States*, 74 F.3d 214 (10th Cir. 1996) 19
Grosz v. *City of Miami Beach*, 721 F.2d 729 (11th Cir. 1983) 21

TABLE OF AUTHORITIES—continued

Page

Islamic Ctr. of Miss., Inc. v. *City of Starkville*, 840 F.2d 293 (5th Cir. 1988) 22, 23
Jolly v. *Coughlin*, 76 F.3d 468 (2d Cir. 1996) 22
Kirkpatrick v. *Seligman & Latz, Inc.*, 636 F.2d 1047 (5th Cir. 1981) 14
Kissinger v. *Board of Trs.*, 5 F.3d 177 (6th Cir. 1993) 16, 17
Knight v. *Connecticut Dep't of Pub. Health*, 275 F.3d 156 (2d Cir. 2001) 17
Leebaert v. *Harrington*, 332 F.3d 134 (2d Cir. 2003) 17
Lyng v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) 21
Marks v. *City of Chesapeake*, 883 F.2d 308 (4th Cir. 1989) 13
McCarron v. *United States*, 12 Cl. Ct. 582 (Cl. Ct. 1987), *aff'd*, 846 F.2d 78 (Fed. Cir. 1988) 14
Miller v. *Reed*, 176 F.3d 1202 (9th Cir. 1999) 18
Mississippi Univ. for Women v. *Hogan*, 458 U.S. 718 (1982) 13
Palmore v. *Sidoti*, 466 U.S. 429 (1984) 13
Rector, Wardens & Members of Vestry v. *City of New York*, 914 F.2d 348 (2d Cir. 1990) 21
Reich v. *Continental Cas. Co.*, 33 F.3d 754 (7th Cir. 1994) 19
San Jose Christian Coll. v. *City of Morgan Hill*, 360 F.3d 1024 (9th Cir. 2004), *available at* 2004 WL 414923 20
Sherbert v. *Verner*, 374 U.S. 398 (1963) 23, 24, 25
Sierra Club v. *EPA*, 322 F.3d 718 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 1043 (2004) 19
Swanson ex rel. Swanson v. *Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694 (10th Cir. 1998) 18
Taylor v. *Johnson*, 257 F.3d 470 (5th Cir. 2001) 14

TABLE OF AUTHORITIES—continued

Page

Tenafly Eruv Ass'n v. *Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002), *cert. denied*, 123 S. Ct. 2609 (2003) 17

Texas Monthly, Inc. v. *Bullock*, 489 U.S. 1 (1989) 22

Thiry v. *Carlson*, 78 F.3d 1491 (10th Cir. 1996) .. 21, 22

Thomas v. *Anchorage Equal Rights Comm'n*, 165 F.3d 692 (9th Cir. 1999), *vacated on ripeness grounds*, 220 F.3d 1134 (9th Cir. 2000) 18

Thomas v. *Review Bd.*, 450 U.S. 707 (1981)... 23, 24, 25

United States v. *Batchelder*, 442 U.S. 114 (1979) 14

Village of Euclid v. *Ambler Realty Co.*, 272 U.S. 365 (1926) 2, 9

CONSTITUTION AND STATUTE

U.S. Const. amend. I 2

U.S. Const. amend. XIV 2

42 U.S.C. § 2000bb *et seq.* 19

42 U.S.C. § 2000cc 2

LEGISLATIVE HISTORY

H.R. Rep. No. 106-219 (1999) 26

146 Cong. Rec. E1564-67 (daily ed. Sept. 22, 2000) 3, 25

PETITION FOR A WRIT OF CERTIORARI

Petitioners Christ Center, Christian Covenant Outreach Church, His Word Ministries to All Nations, Christian Bible Church, Monte De Sion (Mount Zion) Church, and Civil Liberties for Urban Believers respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The order of the court of appeals denying petitioners' petition for rehearing *en banc* was entered on November 26, 2003, is unreported, and is reprinted in the Appendix to this Petition ("Pet. App.") at 68a-69a. The underlying opinion of the court of appeals was entered on August 20, 2003, is reported at 342 F.3d 752 (7th Cir. 2003), and is reprinted in the Pet. App. at 1a-35a. The opinion of the United States District Court for the Northern District of Illinois, as amended, was entered on October 17, 2001, is reported at 157 F. Supp. 2d 903 (N.D. Ill. 2001), and is reprinted in the Pet. App. at 43a-67a. The District Court's opinion denying plaintiffs' motion to alter or amend the judgment was entered on March 29, 2002, is unpublished and available at 2002 WL 485380, and is reprinted in the Pet. App. at 36a-42a.

JURISDICTION

The opinion of the court of appeals was entered on August 20, 2003, and the order of the court of appeals denying petitioners' petition for rehearing *en banc* was entered on November 26, 2003. By order of February 3, 2002, this Court granted petitioners' request for an extension until April 2, 2004, within which to file this petition. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

This petition involves the First and Fourteenth Amendments of the United States Constitution and Section 2 of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc. The pertinent text of these provisions is set forth in the Pet. App. at 70a-73a.

STATEMENT OF THE CASE

This case gives the Court an opportunity to answer important questions about its free exercise and equal protection decisions and thereby resolve clear and irreconcilable conflicts in the courts of appeals. It also provides the Court with an opportunity to resolve these conflicts in the land-use context where, as Congress recognized in enacting the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc ("RLUIPA"), religious communities have often experienced discrimination at the hands of zoning boards nationwide. This case provides an especially appropriate vehicle with which to address these issues because, as Judge Posner recognized in his dissent below, the zoning scheme here discriminates against religious communities that are either new, small or composed of mostly minority members. See Pet. App. 25a-35a (Posner, J., dissenting).

A. "Euclidean" Zoning. An understanding of the issues in this petition requires a brief review of zoning schemes generally and their unique intersection with religious communities. The zoning scheme this Court described in *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926), aims to implement a comprehensive vision for sound land-use decisions. In this Euclidean utopia, churches are to be tucked away in residential zones, close to their members' homes and away from business, commercial or manufacturing zones.

This vision no longer comports with the reality of many American religious communities, particularly small religious groups in large urban areas. New churches are constantly being formed, often by small groups of devout individuals, many of whom are racial minorities or recent immigrants. Moreover, as Judge Posner observed, this "is not happening in just a Christian context. Within the New Age movement, Muslim, Hindu, and even Jewish traditions, small groups are gathering in storefront meeting houses." Pet. App. 30a (internal quotation omitted). Often, these individuals do not live in the same neighborhoods and are instead bound together only by their shared religious faith.

As these "new, small, or impecunious" religious communities and "obscure sects," Pet. App. 29a, grow and seek more permanent space, that space is seldom available in residential areas that match the stereotype of where a "proper" church should be. New religious communities often find that there are no available properties in the favored residential zones, or that the only available properties are too small and too far from more visible and more accessible areas that would aid church growth. Accordingly, such communities look instead to commercial or business zones for quarters that can both satisfy their requirements for affordable meeting space and situate them in visible and accessible locations. Indeed, as Judge Posner observed below, these religious communities may "trad[e] off the cost to the church of noisy and profane surroundings against the benefits in lower costs of land acquisition and proximity to sinners, including prostitutes, drug addicts, and gang members whose souls are particularly in need of saving." *Id.* at 32a.

As demonstrated in a vast record compiled during Congress's consideration of RLUIPA, these so-called "storefront churches" face enormous challenges from local zoning authorities. See, *e.g.*, 146 Cong. Rec. E1564-67 (daily ed. Sept. 22, 2000). Frequently, religious communities are altogether forbidden in these commercial locations. Or they

might be permitted but, as in this case, only with a special use permit from the local zoning authority. The process for obtaining the requisite permits, moreover, is often subject to the political whim of the majority group. And it frequently entails run-arounds and prohibitive expense for small congregations, which must also face religious, racial, ethnic, socioeconomic and local prejudices. Pet. App. 34a-35a.

B. Factual Background of This Case. The Chicago Zoning Ordinance ("CZO") presents these all-too-typical challenges for urban religious communities. See Pet. App. 2a. Like most Euclidean zoning regimes, the CZO allows churches to locate as of right only in residential ("R") zones. In business ("B") and most commercial ("C") zones, churches are deemed "special uses" that require approval from the City's Zoning Board of Appeals ("ZBA").[1]

1. At the outset of this litigation, numerous nonreligious assembly uses were treated better than religious assembly uses in B and C zones. For example, nonreligious assemblies—including clubs, lodges, community centers, meeting halls, stadiums, auditoriums, and arenas seating up to 2000 persons—were permitted as of right in B and C zones, whereas religious assemblies were not. Moreover, whereas churches were altogether precluded from locating in M zones, private clubs, lodges, and community centers were freely permitted.

While some of this patently discriminatory treatment has been remedied by recent amendments to the City's zoning ordinances, various "mainstream" religions and non-religious

---

[1] Specifically, churches are not permitted in C4 zones, though they are possible special uses in C1, C2, and C3 zones. In zones where churches are not an authorized special use—including manufacturing ("M") zones—churches are effectively precluded, though it remains possible in theory to petition the Chicago City Council for a Map Amendment, which rezones the targeted parcel. In addition, any church development of more than two acres (necessary for congregations of roughly 500 or more members) requires the City Council to approve a Planned Development.

groups have retained their favored status.[2] For instance, nonreligious assembly uses such as colleges and universities, funeral parlors, art galleries, offices, gymnasiums, restaurants, music schools, theaters, community homes, labor organization lodges and taverns are still permitted as of right in B and C zones, while churches are not. Also, assembly uses such as taverns, trade schools, restaurants and offices of labor organizations continue to be permitted in M zones, while religious assemblies are flatly banned. And, of course, as Judge Posner noted, existing religious communities continue to enjoy enormous advantages over communities that are new to the religious "'marketplace.'" Pet. App. 30a.

2. Petitioners—five Chicago churches and CLUB, an association of about 30 Chicago-area churches—sought places for religious worship. For these congregations, having a place of assembly for worship and other ministries is integral to their exercise of religion. They need such a place to share their beliefs; teach; pray; help the poor, young and elderly; and engage in numerous other religious activities. See, *e.g.*, Plaintiffs' Statement of Uncontested Material Facts ¶ 27.A-O. Yet petitioners found the acquisition of suitable property difficult, expensive and ultimately impractical.

One reason is that the City's residential zones are fully developed and available lots in residential zones were not of suitable size. For example, R zones "generally do not provide

---

[2] In February 2000, as a direct result of this litigation, the City amended its zoning ordinances (1) to require many of the non-religious organizations identified in the text to seek special use permits to locate in B or C zones and (2) to forbid some of these organizations from locating in M zones. However, as Judge Posner explained, "[t]he amendment did not moot [petitioners'] challenge to the old ordinance because they seek damages for the delay they encountered in obtaining permission to build in desirable locations." Pet. App. 34a. If the special use permit requirement is unconstitutional, as Judge Posner concluded it is, "then the delay [petitioners] encountered in finding suitable quarters was the consequence of a constitutional violation and the [petitioners] are entitled to damages." *Id.*

churches with the visibility, accessibility and space they need," and existing church buildings were "extremely scarce." *Id.* ¶¶ 20-23. By contrast, buildings and locations in business and commercial zones have the availability, size, affordability, adaptability, parking, accessibility and visibility necessary to fulfill these congregations' religious ministries. *Id.* ¶ 28.

While trying to gain special use approval for locations in B and C zones, moreover, petitioners experienced the inherent injustices of the City's zoning regime. As Judge Posner recognized in his dissent below, this zoning scheme imposes a "formidable" and "severe burden on new churches." Pet. App. 35a.

For instance, local aldermen frequently led neighborhood opposition to petitioners' special use permit applications. At least once, an alderman simply declared that "he would not allow" a church at a particular location. Pet. App. 49a. In another case, a church located suitable property in a C zone and gained some neighborhood support, only to have the local alderman have the property rezoned as an M district, effectively precluding a church. Pet. App. 50a-51a.

Petitioners variously could not afford to go through the zoning process or could not find a property seller willing to hold the property off the market for the five to six months necessary to acquire a zoning permit. Petitioners found that, even if an owner would contract to sell a property in a B or C zone, the church would have to employ a "zoning contingency" clause because of the serious risk of an adverse ruling from the ZBA. See, *e.g.*, Plaintiffs' Statement of Uncontested Material Facts ¶ 30. Moreover, although the five named churches ultimately found buildings in which to meet, they incurred significant and unnecessary costs that both impeded and delayed their ability to carry out their religious missions as effectively as they could have under a less discriminatory zoning regime.

C. Proceedings Below. In 1994, petitioners initiated this action to redress the City's discriminatory treatment of religious communities. Petitioners alleged *inter alia* that (1) the zoning ordinance violated the Equal Protection Clause by treating religious institutions worse than similar non-religious groups, and small or minority churches less favorably than more well-established churches; and (2) the zoning ordinance (and certain decisions made under it) violated the First Amendment by depriving petitioners of their rights to free exercise of religion, free speech and freedom of assembly, as well as their rights under the "hybrid rights" doctrine articulated in *Employment Division* v. *Smith*, 494 U.S. 872 (1990). In a 2000 amended complaint, petitioners added claims against the City under the newly enacted Religious Land Use and Institutionalized Persons Act.

Following litigation on various preliminary issues, the United States District Court for the Northern District of Illinois considered cross-motions for summary judgment. It ultimately denied petitioners' motion and granted the City's motion. See Pet. App. 43a.

D. The Court of Appeals' Decision And Judge Posner's Dissent. In a 2-1 decision, a panel of the Seventh Circuit affirmed the district court's entry of summary judgment in favor of the City on each of petitioners' claims. Pet. App. 24a-25a. Judge Posner dissented.

1. On petitioners' equal protection claim, the majority (Bauer and Evans, J.J.) affirmed the district court's grant of summary judgment and rejected petitioners' argument that this Court's decision in *City of Cleburne* v. *Cleburne Living Center*, 473 U.S. 432 (1985), required more than bare rational basis review. The majority concluded that no kind of heightened scrutiny applied. Pet. App. 21a-22a (applying *Cleburne*). Under rational basis review, the court reasoned that any difference in the City's treatment of churches was rationally related to its interest of regulating land use within the city limits. *Id.* at 23a.

In dissent, Judge Posner concluded that the restrictions the City's zoning ordinance placed on religious communities violated the Equal Protection Clause as interpreted in *Cleburne*. Pet. App. 26a-27a (Posner, J., dissenting). As Judge Posner explained, *Cleburne* "identif[ied] a category of sensitive uses or activities, where judges are to be more alert for unjustifiable discrimination than in the usual case in which government regulations are challenged on equal protection grounds." *Id.* at 26a. Noting the inconsistency between the majority's analysis and the opinions of two other circuits, Judge Posner reasoned that churches are just such a sensitive use. *Id.* at 28a (citing *Cornerstone Bible Church* v. *City of Hastings*, 948 F.2d 464 (8th Cir. 1991), and *Congregation Kol Ami* v. *Abington Township*, 309 F.3d 120, 136-37 (3d Cir. 2002)). As he put it, "[R]eligion arouses strong emotions, sectarian rivalry is intense and often bitter, and the mixing of religion and government is explosive." *Id.*

Further, according to Judge Posner, the City's zoning ordinance favors well-established sects that acquired their land in residential areas when such land was more plentiful and affordable, and against "new, small, . . . impecunious" and "obscure sects." Pet. App. 29a. For these reasons, he concluded that "[w]hen government singles out churches for special regulation . . . the risk of discrimination . . . against particular sect[s] is great enough to require more careful judicial scrutiny than in the ordinary equal protection challenge to zoning." *Id.* at 28a-29a.

2. On the substantial burden issue, the majority also held that the City was entitled to summary judgment on petitioners' claims under the Free Exercise Clause and RLUIPA's Section 2(a). In so doing, the majority found petitioners could not establish the substantial burden required by both provisions. The Seventh Circuit held that a "substantial burden" involved something greater than a mere pressure or tendency to coerce individuals to alter their religious beliefs. Instead, the Seventh Circuit imposed a

stricter standard, holding that "a land-use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise—including the use of real property for the purpose thereof within the regulated jurisdiction generally—*effectively impracticable*." Pet. App. 13a. Under this "effectively impracticable" test, the court of appeals found that petitioners could not show the zoning ordinance violated either the Free Exercise Clause or the "substantial burden" provision of RLUIPA. Despite the difficulties associated with finding suitable properties for churches, the ordinance, according to the majority, did not "render impracticable the use of real property in Chicago for religious exercise." *Id.*[3]

REASONS FOR GRANTING THE PETITION

Since *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926), federal and state courts have decided hundreds of cases brought by synagogues, churches, or mosques against municipal zoning laws. This case presents distinct but complementary questions that arise often in these cases and

---

[3] The court of appeals also rejected petitioners' argument that the zoning ordinance was not generally applicable because it incorporated discretionary processes and individualized exemptions from general requirements. The court concluded that the zoning ordinance was "generally applicable because the system for seeking exemptions was mandatory for all nonconforming uses." Pet. App. 18a-19a.

As to petitioners' "hybrid rights" claim, the majority concluded that petitioners' claim failed because the companion rights they raised—free exercise, freedom of speech, freedom of assembly, and equal protection—"individually lack[ed] the merit necessary to withstand summary judgment." Pet. App. 19a. As previously noted, however, Judge Posner found merit in petitioners' equal protection argument. *Id.* at 35a.

The majority also rejected petitioners' discrimination claim under RLUIPA, and did not reach the issue of RLUIPA's constitutionality. Pet. App. 10a-15a.

on which the courts of appeals (and state supreme courts) are hopelessly divided. These conflicts, moreover, reflect a fundamental disagreement over the proper interpretation of this Court's decisions in this critically important area of the law.

I. THIS COURT'S REVIEW IS NEEDED TO DETERMINE THE PROPER STANDARD FOR ASSESSING AN EQUAL-PROTECTION CHALLENGE TO A LAW THAT DISCRIMINATES AGAINST AND AMONG RELIGIOUS USES.

As noted by Judge Posner in his dissent below, this case creates a conflict in the circuits and, in so doing, implicates a significant open question in this Court's equal protection jurisprudence after *City of Cleburne* v. *Cleburne Living Center*, 473 U.S. 432 (1985): whether religious land uses—and other sensitive uses—are entitled only to bare rational basis review or to some degree of heightened review that is "more alert for unjustifiable discrimination." Pet. App. 26a-28a. Put another way, do this Court's equal protection holdings teach, as Judge Posner put it, that "discrimination against sensitive uses is to be given more careful, realistic, skeptical scrutiny by the courts than discrimination against purely commercial activities"? *Id.* at 28a (citing *Cleburne*; *Romer* v. *Evans*, 517 U.S. 620, 634-35 (1996); *Lawrence* v. *Texas*, 123 S. Ct. 2472, 2482 (2003)). The lower courts are in conflict on this critical issue.

1. As noted previously, the majority below applied bare rational basis review to the CZO's differential treatment of religious uses—a scheme that permits religious assemblies as of right only in residential areas but bars them altogether or requires them to secure permits in other zones where similar uses are permitted as of right. Pet. App. 22a-23a. The majority upheld this scheme on the ground that the CZO's differential treatment of religious assemblies (and discrimination against new religious assemblies) is rationally related to Chicago's legitimate interest in regulating land use,

and therefore constitutional. *Id.* In so doing, moreover, the majority held that this Court's decision in *Cleburne* requires nothing more than rational basis review of land-use regulations that discriminate on the basis of religion. However, as Judge Posner pointed out in his dissent, the majority's approach squarely conflicts with the Eighth and Third Circuits' analyses about the appropriate standard of equal protection review to apply to religious land-use cases. *Id.* at 26a (citing *Cornerstone Bible Church* v. *City of Hastings*, 948 F.2d 464, 471-72 (8th Cir. 1991), and *Congregation Kol Ami* v. *Abington Township*, 309 F.3d 120, 133-44 (3d Cir. 2002)).

The Eighth Circuit, in *Cornerstone Bible Church* v. *City of Hastings*, 948 F.2d 464 (8th Cir. 1991), sustained a church's equal protection challenge to a zoning ordinance that is indistinguishable from the CZO in that it permitted private clubs in C-3 zones but excluded churches. *Id.* at 466. In so holding, it applied a more searching inquiry than bare rational basis review. As the Eighth Circuit explained, this Court's equal protection holdings require that the differential treatment of churches and private clubs in a zoning ordinance "must be *relevant*"—not just rationally related—to the objectives the City is attempting to achieve through its ordinance," and that the government bears the burden of proof on this issue. *Id.* at 471 (emphasis added). Because the plaintiff church had shown its similarity to non-commercial uses permitted in C-3 zones, the City bore the burden of demonstrating that its exclusion of the church was "relevant" to a legitimate objective. *Id.*

Unlike the Seventh Circuit majority, moreover, the Eighth Circuit treated as irrelevant the fact that the ordinance there allowed churches in the 45 percent of the city that was zoned residential. And the government's justification that churches did not generate economic activity was problematic in light of the fact that the city permitted other non-profit entities to locate as of right where churches could not. *Id.* at 470-71.

This holding conflicts squarely with the Seventh Circuit's conclusion in this case that the CZO passes muster because it is rationally related to the City's "interest in regulating land-use." Pet. App. 23a.

Like the Eighth Circuit, the Third Circuit recently engaged in an inquiry that is more searching than bare rational basis review. In *Congregation Kol Ami* v. *Abington Township*, 309 F.3d 120 (3d Cir. 2002), the Third Circuit considered a zoning ordinance that, much like the CZO and the ordinance in *Cornerstone Bible Church*, excluded "religious institutions" from a zone where "'country clubs'" were permitted by special exception. *Id.* at 126-27. The Third Circuit noted that this Court "has not yet directly addressed the constitutional incidents of municipal restrictions on use of land by religious institutions." *Id.* at 133. But the Third Circuit nevertheless observed that, although a version of rational basis review is generally applied to cases challenging liberty restrictions by municipalities exercising land use authority, this review must be "meaningful" and alert for "animus or other improper motive." *Id.* at 133, 135.

Applying this careful review, the Third Circuit held that "the initial burden on the complaining party" is "to demonstrate that it is 'similarly situated' to an entity that is being treated differently .... perhaps by citing to the different impact that such entities may have on the asserted goal of the zoning plan." *Id.* at 137. To be "similarly situated," the court explained, is to be "similar in 'kind,' to the uses that are currently permitted." *Id.* at 125.

As to the justification for different treatment, according to the Third Circuit, the proffered reasons must be related to the government's stated goals along a continuum of scrutiny: "Clearly, as the similarity of use wanes, so too the inequality in treatment will be increasingly tolerated under the law." *Id.* at 142. The court remanded for a finding whether the congregation was similarly situated to another, favored entity. *Id.* at 144.

As Judge Posner recognized in his dissent, the majority's decision below conflicts with the Third Circuit's approach in *Kol Ami*. Specifically, the Seventh Circuit failed to consider whether petitioners and those entities permitted as of right in B and C zones were similarly situated. It also failed to perform any meaningful assessment of respondent's justification for its ordinance in light of the City's stated objectives, and it made no effort to determine whether the differential treatment of religious communities served those objectives.

2. The decision below also conflicts with a Fourth Circuit decision not mentioned in Judge Posner's dissent. In that case, which involved the denial of a special use permit to a palmist, the Fourth Circuit observed that whether the sensitive use is a product of "'inaccurate' or 'stereotypic' fear of the mentally retarded," as in *Cleburne*, of "women," (see *Mississippi University for Women* v. *Hogan*, 458 U.S. 718, 723-30 (1982)), "or, as alleged here, those who practice 'rituals' thought by some to be heretical, the rule remains the same." *Marks* v. *City of Chesapeake*, 883 F.2d 308, 311 (4th Cir. 1989). That is, the courts must probe for impermissible government blessing of unspoken bias against constitutionally protected interests. *Id.* In so doing, the courts ensure that, although "[p]rivate biases may be outside the reach of the law, . . . the law cannot, directly or indirectly, give them effect." *Palmore* v. *Sidoti*, 466 U.S. 429, 433 (1984).

Here too, as Judge Posner noted, the record indicates bias against new and obscure sects in favor of more established, mainline sects. Accordingly, it implicates, at the very least, a need for a more searching judicial review than the bare rational basis review given below.

3. The Seventh Circuit's decision also conflicts with *Cleburne* itself. As Judge Posner observed in his dissent, *Cleburne* "expands the boundaries of 'rationality' review" because it "instantiates though it does not articulate the proposition that discrimination against sensitive uses is to be

given more careful, realistic, skeptical scrutiny by the courts than discrimination against purely commercial activities." Pet App. 27a-28a. Like the claimants in *Cleburne*, "[c]hurches are no less sensitive a land use than homes for the mentally retarded, as both *Congregation Kol Ami* . . . and *Cornerstone Bible Church* . . . . recognize, though the reason is different." *Id.* at 28a.

As Judge Posner explained:

> religion arouses strong emotions, sectarian rivalry is intense and often bitter, and the mixing of religion and government is explosive. When government singles out churches for special regulation, . . . the risk of discrimination, not against religion as such . . . but against particular sects, is great enough to require more careful judicial scrutiny than in the ordinary equal protection challenge to zoning.

Id. at 28a-29a. Thus, in a case like this one, which involves "obscure sects" and "new, small, or impecunious" religious communities, *id.* at 29a, *Cleburne* requires a more searching inquiry than bare rational basis review.[4]

---

[4] Even assuming, *arguendo*, that the City's actions here would satisfy rigorous rational basis review, this case also presents an apt opportunity to clarify statements in this Court's earlier cases suggesting that religion itself is a suspect (or quasi-suspect) class subject to strict scrutiny review. For example, in *United Sates*. v. *Batchelder*, 442 U.S. 114 (1979), the Court observed that "[t]he Equal Protection Clause prohibits selective enforcement 'based upon an unjustifiable standard such as race, religion, or other arbitrary classification.'" *Id.* at 125 n.9 (quoting *Oyler* v. *Boles*, 368 U.S. 448, 456 (1962)) (emphasis added); *see City of New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976) (referencing "suspect distinctions such as race, religion, or alienage"). Numerous circuits have also suggested that religion may be a suspect class. *See Taylor* v. *Johnson*, 257 F.3d 470, 473 n.2 (5th Cir. 2001); *Ball* v. *Massanari*, 254 F.3d 817, 823 (9th Cir. 2001); *Kirkpatrick* v. *Seligman & Latz, Inc.*, 636 F.2d 1047, 1049 (5th Cir. 1981); *McCarron* v. *United States*, 12 Cl. Ct. 582, 586 (1987), *aff'd*, 846 F.2d 78 (Fed. Cir. 1988); *but cf.*, *Bower* v. *Village of Mount Sterling*, 44 Fed. Appx. 670, 676 (6th Cir 2002) (unreported in Federal Reporter).

4. If something more than bare rational basis review is applied here, there can be little doubt that, as Judge Posner concluded, "the restrictions that Chicago's zoning ordinance places on churches . . . violate the equal protection clause" and "denied plaintiffs the equal protection of the laws." Pet. App. 25a, 35a. As Judge Posner explained, for example, the original zoning ordinance—which is still the subject of a claim for damages—"allowed fraternal lodges and other clubs, community centers, and other meeting places to locate in the commercial zone without obtaining a permit." *Id.* at 33a-34a. This was so even though (a) "[t]he only difference between them and churches is that they are secular" and (b) "[t]here is no difference so far as the use of land is concerned." *Id.* at 34a. And even the revised ordinance retains at least "one completely unreasonable distinction, that between union lodges and churches, putting one in mind of the Spanish Civil War, a struggle between syndicalism and clericalism." *Id.*

Likewise, as Judge Posner further noted, the government's proffered "distinction between churches on the one hand and libraries and colleges on the other hand . . . is only a little more than rational." Pet. App. 34a. And the notion that commercial concerns are preferred to secular ones is "a bad reason" to exclude religious assemblies because "there are very few blocks in Chicago that are purely commercial." *Id.* at 31a. Finally, the justification that churches themselves should not want to be located in commercial areas because of "noise and commotion" is, as Judge Posner concluded, "absurdly paternalistic." *Id.* at 32a.

In short, given the similarity of the religious and secular assemblies that are treated differently within a given zone, and the various unconvincing explanations offered by the government for distinguishing between these uses, respondent's scheme cannot satisfy any kind of "rational-basis plus" review. Because this case squarely presents the issue of what standard applies to land-use regulations that

discriminate against and among religions, this Court should grant review and resolve the circuit conflict on this important issue.

5. Given Judge Posner's endorsement of petitioners' equal protection claim, granting review in this case would also give the Court an opportunity, if it so chooses, to resolve an acknowledged, three-way conflict on a related issue. That is the question of how—and whether—to apply the "hybrid rights" principle articulated by this Court in *Employment Division* v. *Smith*, 494 U.S. 872 (1990). In *Smith*, this Court explained that the only cases in which it had held that the First Amendment barred application of a neutral and generally applicable law to religiously-motivated action were those involving the Free Exercise Clause in conjunction with other specific constitutional protections. See *id.* at 881. Although the Court cited several examples of such "hybrid situation[s]," *id.* at 881-82, *Smith*'s discussion of "hybrid rights" has engendered considerable confusion.[5]

At one extreme, two circuits have brazenly refused to follow this Court's teaching about hybrid rights in *Smith* and declined even to consider a hybrid rights claim when a plaintiff asserts one. For example, the Sixth Circuit has ridiculed the hybrid rights principle as "completely illogical." *Kissinger* v. *Board of Trs.*, 5 F.3d 177, 180 (6th Cir. 1993). And it has held that, "at least until the Supreme Court holds that legal standards under the Free Exercise Clause vary

---

[5] As Justice Souter put it:

> If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule . . . . But if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all.

Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 567 (1993) (Souter, J., concurring in part and concurring in judgment).

depending on whether other constitutional rights are implicated, we will not use a stricter legal standard than that used in *Smith* to evaluate generally applicable, exceptionless state regulations under the Free Exercise Clause." *Id.* The Second Circuit has reached the same conclusion. *Knight* v. *Connecticut Dep't of Pub. Health*, 275 F.3d 156, 167 (2d Cir. 2001) (holding that *Smith*'s hybrid rights language is "dicta and not binding on this court"); *accord Leebaert* v. *Harrington*, 332 F.3d 134, 143-44 (2d Cir. 2003) (following *Knight*). And the Second Circuit has squarely acknowledged the conflict with those circuits that have accepted the viability of hybrid rights claims. See *Knight*, 275 F.3d at 167 ("[B]ased on this language from *Smith*, some courts have acknowledged the possibility of hybrid rights claims. Other courts have rejected hybrid rights analysis outright.") (citations omitted); *accord Leebaert*, 332 F.3d at 143-44 (noting circuit split on whether to apply hybrid rights principle at all); *City Chapel Evangelical Free Inc.* v. *City of South Bend ex rel. Dep't of Redev.*, 744 N.E.2d 443, 452-53 & nn.11-12 (Ind. 2001) (plurality opinion) (noting that hybrid rights "arguably [have] not [been] uniformly construed and applied" and citing numerous federal and state cases discussing hybrid rights).

Of the circuits that have accepted the possibility of hybrid rights claims, some—like the majority below—have demanded that the companion claim be meritorious on a freestanding basis. See *Brown* v. *Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 539 (1st Cir. 1995) (rejecting a hybrid rights claim because the free exercise claim was "not conjoined with an *independently* protected constitutional protection") (emphasis added); *Tenafly Eruv Ass'n* v. *Borough of Tenafly*, 309 F.3d 144, 165 & n.23 (3d Cir. 2002) (rejecting a hybrid rights claim because the plaintiffs had not met their full burden of proof on the companion free speech claim), *cert. denied*, 123 S. Ct. 2609 (2003).

By contrast, the Ninth and Tenth Circuits have adopted a more moderate course. They have held that a plaintiff states a hybrid rights claim under *Smith* whenever the companion claim to the Free Exercise claim is "colorable." See *Swanson ex rel. Swanson* v. *Guthrie Ind. Sch. Dist. No. I-L*, 135 F.3d 694, 700 (10th Cir.); *Miller* v. *Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999). As the Tenth Circuit recently explained:

> it makes no sense to adopt a strict standard that essentially requires a successful companion claim because such a test would make the free exercise claim unnecessary. If the plaintiff's additional constitutional claim is successful, he or she would typically not need the free exercise claim and the hybrid-rights exception would add nothing to the case.

Axson-Flynn v. *Johnson*, 356 F.3d 1277, 1296-97 (10th Cir. 2004). In both circuits, moreover, "colorable" has been defined to mean a likelihood, or fair probability, of success on the merits. See *id.* at 1295; *Miller*, 176 F.3d at 1207; *accord Thomas* v. *Anchorage Equal Rights Comm'n*, 165 F.3d 692, 705-06 (9th Cir. 1999) (analogizing the "colorability" test in a hybrid-rights context to the "likelihood of success on the merits" standard for preliminary injunctions), *vacated on ripeness grounds*, 220 F.3d 1134 (9th Cir. 2000) (en banc).

As noted above, the majority below summarily rejected petitioners' hybrid rights claim because it found the companion claims "*individually* lack[ed] the merit necessary to withstand summary judgment." Pet. App. 19a (emphasis added). In so holding, the majority necessarily rejected the "colorable claim" standard used in the Ninth and Tenth Circuits, under which a claimant need only show that its speech, assembly and equal protection claims had a fair probability of succeeding on the merits. *Axson-Flynn*, 356 F.3d at 1295; *Miller*, 176 F.3d at 1207. The decision below

thus squarely conflicts with decisions in those circuits.[6] And, as Judge Posner's dissent demonstrates, petitioners' equal protection claim is at least colorable, therefore establishing the necessary predicate for a hybrid rights claim.

II. THIS COURT'S REVIEW IS NEEDED TO RESOLVE A CONFLICT OVER THE PROPER STANDARD FOR DETERMINING WHEN A LAW IMPOSES A "SUBSTANTIAL BURDEN" ON RELIGION FOR PURPOSES OF THE FREE EXERCISE CLAUSE AND RLUIPA.

The Seventh Circuit's opinion on the meaning of "substantial burden" also widens an existing conflict between those courts of appeals which, like the Seventh Circuit, require religious practice to be made virtually impossible and those that merely require a substantial increase in the cost of religious observance. This Court's guidance is badly needed to resolve this core question of federal law, which arises frequently in the application of the Free Exercise Clause, RLUIPA, and the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb *et seq.*

1. The majority below, like several courts of appeals before it, set a high threshold for finding that government action substantially burdens religion. Observing that RLUIPA has a "broad[] definition of religious exercise," in

---

[6] This conflict is, in turn, the outgrowth of a deeper circuit conflict about the proper status of this Court's dicta. In stark contrast to the approach of the Second and Sixth Circuits in *Knight* and *Kissinger*, some circuits consider themselves bound by considered dicta in this Court's opinions. *E.g.*, *Gaylor* v. *United States*, 74 F.3d 214, 217 (10th Cir. 1996) ("[T]his court considers itself bound by Supreme Court dicta almost as firmly as by the Court's outright holdings, particularly when the dicta is recent and not enfeebled by later statements."); *Reich* v. *Continental Cas. Co.*, 33 F.3d 754, 757 (7th Cir. 1994) (same); *Sierra Club* v. *EPA*, 322 F.3d 718, 724 (D.C. Cir. 2003) ("carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative") (internal quotation marks omitted).

which the exercise at issue "need not be 'compelled by or central to' a particular religion," the Seventh Circuit properly concluded that a "substantial burden" could not be established by the "slightest obstacle to religious exercise incidental to the regulation of land use" or it would render meaningless the word "'substantial.'" Pet. App. 12a. From there, however, the court made an unwarranted logical leap. It concluded that "a land-use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise—including the use of real property for the purpose thereof . . . —*effectively impracticable*." *Id.* at 13a (emphasis added). Applying this standard, the court held that, because the burdens petitioners faced did not make their religious exercise impossible, they were insufficient to establish a substantial burden on religion.

The Seventh Circuit's high threshold is similar to the extreme approach adopted by three other circuits. In a case in which a zoning ordinance prohibited home worship, for example, the Ninth Circuit held that even significant burdens of "convenience and expense" are insufficient for a free exercise violation. *Christian Gospel Church, Inc.* v. *City & County of S.F.*, 896 F.2d 1221, 1223-24 & n.2 (9th Cir. 1990). Recently, the Ninth Circuit reiterated its position on the meaning of "substantial burden" and expressly noted its approach was "entirely consistent" with the Seventh Circuit's "effectively impracticable" standard. *San Jose Christian Coll.* v. *City of Morgan Hill*, 360 F.3d 1024 (9th Cir. 2004), *available at* 2004 WL 414923, at *8.

Similarly, a panel of the Second Circuit reasoned that, because the "central question in identifying an unconstitutional burden is whether the claimant has been denied the ability to practice his religion or coerced in the nature of those practices," there could be no "substantial burden" absent "coercion in religious practices, or the Church's *inability* to carry out its religious mission in its

existing facilities." *Rector, Wardens & Members of Vestry* v. *City of New York*, 914 F.2d 348, 355 (2d Cir. 1990) (emphasis added). Accordingly, even though the landmarking law at issue there "*drastically* restricted [a] Church's ability to raise revenues to carry out its various charitable and ministerial programs" by building an office tower, no substantial burden was shown. *Id.* (emphasis added).

The Eleventh Circuit has adopted a similarly restrictive standard. It has held that a zoning ordinance that entirely precluded the use of residences for organized religious services did not a create substantial burden because it did not "prohibit religious conduct per se." *Grosz* v. *City of Miami Beach*, 721 F.2d 729, 739 (11th Cir. 1983).

In short, the Seventh Circuit has joined three other circuits in requiring that religious practice be made essentially *impossible* before government action will be viewed as imposing a substantial burden on religion.

2. In contrast to this stringent approach, several circuits and state supreme courts have taken a more moderate view. In so doing, they have recognized that burdens fall along a continuum between those that make religious practice impossible and those that impose merely trivial inconveniences. Middle-ground obstacles can constitute a "substantial burden" on religion under decisions in these circuits.

For example, the Tenth Circuit, following this Court's analysis in *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), concluded that a substantial burden is one that has a "'*tendency* to coerce individuals into acting contrary to their religious beliefs.'" *Thiry* v. *Carlson*, 78 F.3d 1491, 1495 (10th Cir. 1996) (emphasis added) (quoting *Lyng*, 485 U.S. at 450). Put another way, it is enough that the government regulation "significantly inhibit or constrain," "meaningfully curtail" or deny "reasonable opportunities" for religious practice. *Id.* (internal quotation

omitted). It need not make religious exercise effectively impracticable. *Id.*[7]

The Washington Supreme Court employed a similar analysis in *First Covenant Church* v. *City of Seattle*, 840 P.2d 174, 183-85 (Wash. 1992). Pointing to this Court's religious taxation cases, that court recognized that "a *financial* burden on religious activity, if too gross, may unconstitutionally infringe on free exercise." *Id.* at 183 (citing *Jimmy Swaggart Ministries* v. *Board of Equalization*, 493 U.S. 378, 391 (1990)); see also *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1, 23 (1989) (plurality opinion) (taxes may result in an unconstitutional imposition on religious activity where "the tax burden is far from negligible"). For example, where land-use regulation "grossly diminishes the value of the Church's principal asset" it "impermissibly burdens [the] right to free exercise of religion" even if it does not make religious observance impossible or impracticable. *First Covenant Church*, 840 P.2d at 184.

Another leading case in this regard is *Islamic Center of Mississippi, Inc.* v. *City of Starkville*, 840 F.2d 293, 299-303 (5th Cir. 1988). That case, like this one, involved a challenge by a minority religious sect to a city's denial of a special use exemption in a non-residential area. The Fifth Circuit concluded that zoning laws that make religious assemblies "relatively inaccessible within the city limits" and thereby ensure that "churches, synagogues, and mosques [become] accessible only to those affluent enough to travel by private automobile," create an "obvious[] burden [on] the exercise of

---

[7] In another decision along these lines, a different panel of the Second Circuit (in an opinion creating an apparent intra-circuit conflict), has explained that "a substantial burden exists where the state 'put[s] *substantial pressure* on an adherent to modify his behavior and to violate his beliefs.'" *Jolly* v. *Coughlin*, 76 F.3d 468, 476-77 (2d Cir. 1996) (quoting *Thomas* v. *Review Bd.*, 450 U.S. 707, 718 (1981)) (emphasis added). This of course is far short of the Seventh Circuit's "effectively impracticable" standard.

religion by the poor." *Id.* at 299. That approach would of course invalidate—or at least preclude summary judgment in favor of—the City's actions here. Respondent's scheme makes urban storefront churches "relatively inaccessible" and thus creates an "obvious" significant burden on petitioners and their congregations, even if it does not make their religious practices "effectively impracticable."

In short, under these more moderate approaches, petitioners would not have had to show that their religious practice was made effectively impossible. They would have to show only that they were significantly inhibited or denied reasonable opportunities to have a house of worship in a B or C zone. Plainly, as Judge Posner put it, petitioners faced that level of "formidable" burden. Pet. App. 35a.

3. The Seventh Circuit's approach also conflicts in principle with this Court's own "substantial burden" decisions. These include *Sherbert* v. *Verner* 374 U.S. 398 (1963), and *Thomas* v. *Review Board*, 450 U.S. 707 (1981), which are the basis for the "substantial burden" standards in RLUIPA (at issue here) and RFRA—and which still apply to at least some free exercise claims after *Smith*, 494 U.S. at 884, including this one.[8]

---

[8] For example, this case falls squarely within the "individual exemptions" category recognized in *Smith* and *Lukumi*, under which strict scrutiny review applies to any law that "represents a system of 'individualized governmental assessment of the reasons for the relevant conduct.'" *Lukumi*, 508 U.S. at 537 (quoting *Smith*, 494 U.S at 884). The zoning ordinance creates just such a system of individualized assessments of land-use matters involving religious uses, and is therefore subject to strict scrutiny if a substantial burden can be shown.

To be sure, as the Tenth Circuit recently observed, "courts and commentators are divided on the question" of when the individualized assessments doctrine applies. *Axson-Flynn*, 356 F.3d at 1297. The Seventh Circuit's conclusion that this doctrine does *not* apply here simply expands this growing conflict. Indeed, that decision conflicts with numerous decisions such as a decision of the Washington Supreme Court holding that land-use ordinances that "contain mechanisms for individual

A review of *Sherbert* is instructive because it did not involve government action that even approached making religious practice effectively impracticable, as the Seventh Circuit and several others would require. Instead, it involved a simple denial of unemployment benefits to a Sabbatarian who was fired for refusing to work on Saturday. 374 U.S. at 399-400. Yet this Court squarely rejected the argument that, because all that was at issue was a government "benefit or privilege," there was no substantial burden. Instead, this Court observed that even "conditions and qualifications upon governmental privileges and benefits" frequently "have been invalidated because of their *tendency to inhibit* constitutionally protected activity." *Id.* at 404 & n.6 (emphasis added). Elsewhere, this Court explained that the substantial burden requirement meant, not that the plaintiff must show that the regulation mader her religious observance "effectively impracticable," but simply that the rule put "pressure upon her to forego [a religious] practice." *Id.* at 404.

The same was true in *Thomas* v. *Review Board*, 450 U.S. 707 (1981), another case involving the denial of unemployment benefits to an individual who balked at performing work duties that conflicted with his religious beliefs. The Court reiterated that the government action need not "*compel* a violation of conscience" to place a substantial burden on free exercise. *Id.* at 717. All that is necessary is a "coercive impact" in, for example, "condition[ing] receipt of an important benefit" on the restraint of religious practice, "thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Id.* at 717-18. This

---

exceptions" and "invite individualized assessments" are not generally applicable and require strict scrutiny review. *First Covenant Church*, 840 P.2d at 181. It also conflicts with the Third Circuit's decision in *Fraternal Order of Police Newark Lodge No. 12* v. *City of Newark*, 170 F.3d 359 (3d Cir. 1999), which held that a system in which exemptions are given for secular reasons, but are not extended for religious reasons, "must survive heightened scrutiny." *Id.* at 366.

Court again insisted that, even though "the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." *Id.* at 718. Here again, this is a far cry from showing "effective impracticability."

There can be no doubt that the burdens at issue in this case are "substantial" within the meaning of these decisions. As Judge Posner recognized, the burden on "obscure sects" in this case "was formidable." Pet. App. 29a, 35a. For example, it took one petitioner "three years to find suitable space" through the special use process, whereas equivalent non-religious communities were entitled to locate in such spaces as of right. *Id.* at 35a. This is clearly a "substantial burden" in the sense of decisions such as *Sherbert* and *Thomas* because it has a "*tendency to inhibit* constitutionally protected activity"—in this case communal worship. 374 U.S. at 404 & n.6 (emphasis added).

In sum, the Seventh Circuit's "effectively impracticable" standard departs sharply both from this Court's traditional understanding of "substantial burden" as well as from the appropriate moderate approach taken by a number of circuit and State courts.

* * * *

It is difficult to overstate the practical importance of these issues to American religious life or, indeed, to local governments and their citizens. As Congress found less than four years ago in enacting RLUIPA, "'zoning conflicts between churches and cities have become a leading church-state issue. Disputes have arisen over church soup kitchens or homeless shelters in suburbs, expansion of church facilities, parking squeezes on Sunday, breaches of noise ordinances or disagreements on what kind of meetings the zoning permits.'" 146 Cong. Rec. at E1564. Moreover, hearings held in connection with that legislative effort provided "a substantial record of evidence indicating a widespread pattern of religious discrimination in land use regulation"—

discrimination that especially disfavors "upstart" congregations and communities. H.R. Rep. No. 106-219, at 18 (1999). The Court should take this opportunity to give the lower courts much-needed guidance as to the appropriate legal standards to apply in addressing claims of religious discrimination in the land-use context.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN W. MAUCK
RICHARD S. BELL
MAUCK & BAKER
Suite 2001
One North LaSalle Street
Chicago, Illinois 60602
(312) 726-1243

CARTER G. PHILLIPS
GENE C. SCHAERR*
REBECCA K. WOOD
DAVID S. PETRON
SIDLEY AUSTIN BROWN
& WOOD LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

Counsel for Petitioners

* Counsel of Record

April 2, 2004

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS,
SEVENTH CIRCUIT.

No. 01-4030

CIVIL LIBERTIES FOR URBAN BELIEVERS, CHRIST CENTER,
CHRISTIAN COVENANT OUTREACH CHURCH, et al.,
Plaintiffs-Appellants,

v.

CITY OF CHICAGO,
Defendant-Appellee.

Argued Jan. 17, 2003
Decided Aug. 20, 2003
Rehearing En Banc Denied Nov. 26, 2003

Before BAUER, POSNER, and EVANS, Circuit Judges.

BAUER, Circuit Judge.

Appellants, an association of Chicago-area churches and five individual member churches thereof, appeal from the district court's entry of summary judgment in favor of Appellee, the City of Chicago, on Appellants' claims challenging the Chicago Zoning Ordinance ("CZO"), 17 MUNICIPAL CODE OF CHICAGO, ILL., §§ 1-11, under the federal Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 UNITED STATES CODE § 2000cc *et seq.*, and the United States Constitution. For the reasons set forth below, we affirm the decision of the district court.

BACKGROUND

The CZO broadly divides the city into R, B, C, and M zones for residential, business, commercial, and manufacturing uses, respectively. Each zone, in turn, is subdivided into numbered districts and subdistricts. A majority of Chicago land available for development is zoned R. The CZO's stated purposes include the following: (i) "to promote and to protect the public health, safety, morals, comfort, convenience, and the general welfare of the people," and (ii) "to protect the character and maintain the stability for residential, business, commercial, and manufacturing areas within the City, and to promote the orderly and beneficial development of such areas." *See* 17 MUN. CODE CHI. § 2(1), (3)(2001). Churches are permitted uses as of right in all R zones, but are termed Variations in the Nature of Special Uses ("Special Use") in all B zones as well as C1, C2, C3, and C5 districts. All Special Uses, whether of a religious or nonreligious nature, require approval by the Zoning Board of Appeals ("ZBA") following a public hearing. *See id.* §§ 7.3-1(4), 8.4, 9.4, & 11.10. Special Use approval is expressly conditioned upon the design, location, and operation of the proposed use consistent with the protection of public health, safety, and welfare, and the proposed use must not substantially injure the value of neighboring property. *See id.* § 11.10-4. Factoring such expenses as application, title search, and legal fees, as well as appraisal and neighbor notification costs, the aggregate cost of obtaining Special Use approval approaches $5000. Before a church may locate in a C4 district or an M zone, the Chicago City Council must vote in favor of a Map Amendment, effectively rezoning the targeted parcel. *See id.* §§ 9.4-4, 10, & 11.9. Development for church use of land consisting of two or more acres (necessary for congregations exceeding roughly 500 members) requires approval by City Council vote of a Planned Development. *See id.* § 11.11-1(a) & 11.11-3.

Civil Liberties for Urban Believers ("CLUB") is an unincorporated association of 40 to 50 Chicago-area religious or not-for-profit Illinois corporations ranging in size from 15 to 15,000 congregants. Five of these individual member churches[1] joined CLUB as plaintiffs in an action challenging the validity of the CZO. The district court summarized as follows the encounters of the five individual plaintiff churches with Chicago's zoning framework as alleged in Appellants' complaint:

> Christ Center began meeting in a high school auditorium in 1990, but soon experienced difficulties at this location due to various school functions that interrupted weekly worship. As a result, Christ Center began searching for a building to purchase. The church was unsuccessful in locating an appropriate building in any R districts. In the summer of 1992, Christ Center located a suitable building at 1139-43 West Madison in Chicago. The building was located in a C district and Christ Center promptly applied for a special use permit. After completing the application process, Christ Center reached out to gain the support of neighbors and Alderman Theodore Mazola. Most neighbors favored a taxpaying entity in the neighborhood rather than a church and Alderman Mazola stated that he would support the church's special use permit on any street but Madison. The Zoning Board eventually convened a special hearing on September 18, 1992. On October 18, 1992, the special use permit was denied. Christ Center subsequently found a second building in an M district at 123 South Morgan. The owner of the building also agreed to provide financing. However, the Chicago

---

[1] Those five Churches are (i) Christ Center; (ii) Christian Covenant Outreach Church ("Christian Covenant"); (iii) His Word Ministries to All Nations ("His Word"); (iv) Christian Bible Church ("Christian Bible"); and (v) Monte de Sion Church ("Mount Zion").

Department of Planning and Development informed Christ Center that it would oppose any rezoning application because the particular area was designated to become an entertainment area and the presence of a church would inhibit such development. Christ Center subsequently choose not to file an application for rezoning. In the fall of 1993, Christ Center obtained property at 4445 South King Drive, successfully obtained a special use permit and now operates a church at this location. Christ Center now claims that it paid substantial sums in attorneys fees, appraisal fees, zoning application charges, title charges and other expenses attempting to find suitable property.

Between 1986 and the summer of 1988, Christian Bible met in a private home. The church eventually outgrew this space and began meeting in a funeral home. The funeral home, however, proved aesthetically and administratively problematic. In 1990, Christian Bible located a suitable building in a B district at 83rd and Essex. Alderman Beavers promptly informed Christian Bible that "he would not allow" a church at that location. Consequently, Christian Bible did not apply for a special use permit at this location. In March 1991, Christian Bible purchased property in another B district at 513-23 East 75th Street. The Park Manor Neighbors Association and Alderman Steele both opposed the church's special use permit application. On May 17, 1991, the permit was denied. Christian Bible then unsuccessfully attempted to sell the building for 10 months. In February 1992, Christian Bible renovated the building to enhance its appearance. During these renovations, the church rented space at another location, or held meetings at private homes. Christian Bible later reapplied for a special use permit which was granted on August 20, 1993 with the support of neighbors in the district. Christian Bible now claims the delay in obtaining a special use permit

prevented the church from obtaining a real estate tax exemption. The church further alleges that it also paid substantial sums in expenses related to the application process and also suffered a decrease in membership. Christian Bible now owns and meets at a church at 6210 S. St. Louis and has successfully obtained a special use permit to operate the church.

From February, 1988 to December, 1993, Mount Zion rented space in a C district at 4545 North Kedzie. During this period, Mount Zion never applied for a special use permit. In 1990, a [Chicago] inspector ordered Mount Zion to vacate the building. In April 1993, Mount Zion located suitable rental property at 3949 North Pulaski, and applied for a special use permit. During this process, the Zoning Board informed Mount Zion that the building lacked adequate parking accommodations for a church and both the building and each parking lot would require special use permits. Alderman Wojcik and a neighborhood group also opposed Mount Zion's application. Consequently, Mount Zion withdrew its application for a special use permit. Mount Zion now owns and meets in a church at 3807 N. Lavergne.

On November 1, 1992, Christian Covenant first rented property in a C district. The owner of the building offered to co-sign a loan enabling Christian Covenant to purchase the property. However, [Chicago] inspectors ordered Christian Covenant to stop using the building as a church without a special use permit. As a result, Christian Covenant did not purchase the building out of fear [Chicago] would not allow the building to be used as a church without a special use permit. Christian Covenant now owns and meets in a church located in an R district.

Between 1990 and 1992, His Word met in the basement of a private home until membership outgrew these

> accommodations. In 1992, His Word located a suitable building in a C district at 1616 West Pershing. On March 27, 1992, the church signed a purchase contract contingent upon the grant of a special use permit. After filing their special use permit application, His Word met with neighbors in the district who generally supported it. Alderman Patrick Huels stated he would neither support nor oppose the application. On three separate occasions, at the request of Alderman Huels, the [ZBA] postponed a hearing on His Word's application. On October 14, 1992, Alderman Huels introduced an amendment to the [CZO] to rezone the property located at 1616 West Pershing from a C district to an M district. After a hearing on December 10, 1992, Alderman William Banks and other aldermen on the Chicago Committee on Zoning of the Chicago City Council voted to recommend approval of the amendment.
>
> Both His Word and Citibank, the owner of the building, opposed the rezoning. On December 15, 1992, the Chicago City Council voted to enact the rezoning amendment changing 1616 West Pershing from a C district to an M district. His Word subsequently withdrew its application for a special use permit; the church spent a considerable sum on filing, attorney's and appraiser's fees. His Word now owns and meets in a church located in an R district.

Civil Liberties for Urban Believers v. Chicago, 157 F.Supp.2d 903, 907-08 (N.D.Ill.2001).

This appeal from the district court's summary judgment ruling in favor of Chicago on Appellants' fourth amended complaint reaches us via a long and tortuous procedural path.[2]

---

[2] The procedural history includes an opinion of this Court holding that legislative immunity shields Chicago Aldermen William Banks and Patrick Huels from any liability arising out of their zoning-related actions. Plaintiffs Ira Iglesia de la Biblia Abierta and His Word sought to hold the

Appellants amended their original complaint to remove claims challenging the CZO under the federal Religious Freedom Restoration Act, 42 U.S.C.2000bb *et seq.* ("RFRA"), after the Supreme Court invalidated relevant provisions of RFRA in *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997). In February 2000, in response to Appellants' remaining constitutional challenges to the CZO's designation of churches vis-à-vis various nonreligious assembly uses in B, C, and M zones, the City Council amended the CZO to require clubs, lodges, meeting halls, recreation buildings, and community centers to obtain Special Use approval in order to locate within any B and C zones and a Map Amendment in order to locate within any M zone. The amendments also (i) exempt churches from the requirement that a Special Use applicant affirmatively demonstrate that the proposed use "is necessary for the public convenience at that location" and (ii) provide that a Special Use permit shall automatically issue in the event that the ZBA fails to render a decision within 120 days of the date of application. Several months thereafter, Congress reacted to the Supreme Court's decision in *City of Boerne* with the enactment of RLUIPA and Appellants subsequently amended their complaint once more to include claims against Chicago pursuant to RLUIPA.[3]

In addition to the RLUIPA claim, Appellants' final amended complaint argued, in part, that the CZO and the administrative and legislative processes for obtaining Special

---

aldermen personally liable for alleged civil rights violations resulting from the aldermen's introduction of legislation intended to rezone 1616 West Pershing Road, effectively preventing its use as a church. *See Iglesia de la Biblia Abierta v. Banks*, 129 F.3d 899 (7th Cir.1997); and *Civil Liberties for Urban Believers*, 157 F.Supp.2d at 908.

[3] Noting that the district court's opinion narrates more thoroughly the procedural history of this case, *see* 157 F.Supp.2d at 905-08, we limit our opinion to include only those procedural details directly relating to our disposition of this appeal.

Use, Map Amendment, and Planned Development approval violate Appellants' rights to (i) free exercise of religion, speech, and assembly under the First Amendment of the United States Constitution, (ii) equal protection under the Fourteenth Amendment of the United States Constitution as well as the Illinois Constitution, and (iii) procedural due process under the Fourteenth Amendment of the United States Constitution. Appellants also claimed that the rezoning of 1616 West Pershing Road ("Pershing") violated His Word's constitutional rights.[4]

In granting summary judgment in favor of Chicago, the district court determined that the February 2000 amendments to the CZO removed "any potential substantial burden" on religious exercise, such that Chicago

> avoid[ed] the preemptive force of any provision of [RLUIPA] by changing the policy or practice that result[ed] in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminate[ed] the substantial burden.

42 U.S.C. § 2000cc-3(e). With respect to Appellants' equal protection claims, the district court concluded that Chicago's zoning scheme is rationally related to a legitimate government purpose and thus constitutional. The district court also rejected Appellants' due process claims, noting that City Council and ZBA legislative procedures and practices afforded Appellants what minimal process is due in zoning cases. In its discussion of Appellants' First Amendment claims, the district court explained that the CZO and its

---

[4] Pursuant to 28 U.S.C. § 1367(c), the district court dismissed without prejudice Appellants' claim under the Illinois Religious Freedom Restoration Act, 775 ILL. COMP. STAT. § 35/15.

Special Use provisions are neutral and generally applicable law which do not impermissibly burden the free exercise of religion, and that the operation of a church is subject to zoning laws, even where such operation involves conduct within the core of the First Amendment—here, religious speech and assembly. Finally, while acknowledging that the conduct of Alderman Huels in connection with the Pershing rezoning was "egregious" and perhaps "dishonorable", the district court relied on this Court's decision in *Biblia Abierta*, 129 F.3d at 901-02, to conclude that such legislative action was constitutional insofar as it (i) afforded His Word procedural due process, (ii) was taken subject to neutral and generally applicable ordinances, and (iii) was rationally related to Chicago's legitimate interests in developing the commercial areas adjacent to the parcel while avoiding land-use conflicts.

The district court subsequently denied Appellants' motion, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure ("FRCP"), to reconsider its summary judgment. *See Civil Liberties for Urban Believers v. Chicago*, 2002 WL 485380, No. 94 C 6151 (N.D.Ill. Mar. 29, 2002). This appeal ensued.

ANALYSIS

We review the district court's grant of summary judgment de novo. *See, e.g., Freedom From Religion Foundation v. Bugher,* 249 F.3d 606, 610 (7th Cir.2001). Summary judgment is proper where there is no genuine issue as to any material fact. Such is the case where the nonmoving party has failed to make a sufficient showing on an essential element of his case with respect to which he has the burden of proof, because a complete failure of proof concerning an essential element of his case necessarily renders all other facts immaterial. In such a case, the moving party is entitled to judgment as a matter of law and summary judgment must

issue against the nonmoving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); FED. R. CIV. P. 56(c).

I. *Religious Land Use and Institutionalized Persons Act*

Appellants argue that the CZO violates RLUIPA's substantial burden provision, which requires land-use regulations that substantially burden religious exercise to be the least restrictive means of advancing a compelling government interest, *see* 42 U.S.C. § 2000cc(a), as well as its nondiscrimination provision, which prohibits land-use regulations that either disfavor religious uses relative to non-religious uses or unreasonably exclude religious uses from a particular jurisdiction, *see* 42 U.S.C. § 2000cc(b).[5]

---

[5] In relevant part, those provisions read as follows:

§ 2000cc. Protection of land use as religious exercise.

(a) Substantial burdens.

(1) General rule. No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

(2) Scope of application. This subsection applies in any case in which. . .

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

(b) Discrimination and exclusion.

(1) Equal terms. No government shall impose or implement a land use regulation in a manner that treats a religious assembly or

In order to prevail on a claim under the substantial burden provision, a plaintiff must first demonstrate that the regulation at issue actually imposes a substantial burden on religious exercise. RLUIPA defines "religious exercise" to encompass "any exercise of religion, whether or not compelled by, or central to, a system of religious belief," including "[t]he use, building, or conversion of real property for the purpose of religious exercise." 42 U.S.C. § 2000cc-5(7). This definition reveals Congress's intent to expand the concept of religious exercise contemplated both in decisions discussing the precursory RFRA, *see, e.g., Hicks v. Garner*, 69 F.3d 22, 26 n. 22 (5th Cir.1995) (collecting cases defining "substantial burden on religious exercise" under RFRA), and in traditional First Amendment jurisprudence, *see, e.g., Hernandez v. Commissioner*, 490 U.S. 680, 699, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989) (religious exercise as "the observation of a central religious belief or practice" (citations omitted)); *Thomas v. Review Bd. of the Indiana Employment Sec. Div.*, 450 U.S. 707, 718, 101 S.Ct. 1425, 67 L.Ed.2d 624, (1981) (religious exercise as behavior and beliefs compelled by a particular religion); *Sherbert v. Verner*, 374 U.S. 398, 404, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) (religious exercise as adherence to the central precepts of a religion). Although the text of the statute contains no similar express definition of

---

institution on less than equal terms with a nonreligious assembly or institution.

(2) Nondiscrimination. No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

(3) Exclusions and limits. No government shall impose or implement a land use regulation that—

(A) totally excludes religious assemblies from a jurisdiction; or

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

42 U.S.C. § 2000cc.

the term "substantial burden," RLUIPA's legislative history indicates that it is to be interpreted by reference to RFRA and First Amendment jurisprudence. *See* 146 CONG. REC. 7774-01, 7776 ("The term 'substantial burden' as used in this Act is not intended to be given any broader interpretation than the Supreme Court's articulation of the concept of substantial burden or religious exercise"). Chicago cites a decision of this Court which held that, within the meaning of RFRA, a substantial burden on religious exercise "is one that forces adherents of a religion to refrain from religiously motivated conduct, inhibits or constrains conduct or expression that manifests a central tenet of a person's religious beliefs, or compels conduct or expression that is contrary to those beliefs." *Mack v. O'Leary*, 80 F.3d 1175, 1179 (7th Cir.1996) (vacated on other grounds). Substituting RLUIPA's broader definition of religious exercise, which need not be "compelled by or central to" a particular religion, for that articulated in *Mack*, the meaning of "substantial burden on religious exercise" could be read to include the effect of any regulation that "inhibits or constrains the use, building, or conversion of real property for the purpose of religious exercise." Such a construction might lend support to Appellants' contention that the CZO, insofar as it contributes to other existing constraints upon the use of specific parcels as churches, substantially burdens religious exercise. However, this cannot be the correct construction of "substantial burden on religious exercise" under RLUIPA. Application of the substantial burden provision to a regulation inhibiting or constraining *any* religious exercise, including the use of property for religious purposes, would render meaningless the word "substantial," because the slightest obstacle to religious exercise incidental to the regulation of land use—however minor the burden it were to impose—could then constitute a burden sufficient to trigger RLUIPA's requirement that the regulation advance a compelling governmental interest by the least restrictive means. We

therefore hold that, in the context of RLUIPA's broad definition of religious exercise, a land-use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise—including the use of real property for the purpose thereof within the regulated jurisdiction generally—effectively impracticable.

Appellants contend that the scarcity of affordable land available for development in R zones, along with the costs, procedural requirements, and inherent political aspects of the Special Use, Map Amendment, and Planned Development approval processes, impose precisely such a substantial burden. However, we find that these conditions—which are incidental to any high-density urban land use—do not amount to a substantial burden on religious exercise. While they may contribute to the ordinary difficulties associated with location (by any person or entity, religious or nonreligious) in a large city, they do not render impracticable the use of real property in Chicago for religious exercise, much less discourage churches from locating or attempting to locate in Chicago. *See, e.g., Love Church v. City of Evanston*, 896 F.2d 1082, 1086 (7th Cir.1990) ("Whatever specific difficulties [plaintiff church] claims to have encountered, they are the same ones that face all [land users]. The harsh reality of the marketplace sometimes dictates that certain facilities are not available to those who desire them"). Significantly, each of the five individual plaintiff churches has successfully located within Chicago's city limits. That they expended considerable time and money so to do does not entitle them to relief under RLUIPA's substantial burden provision. *See, e.g., Stuart Circle Parish v. Board of Zoning Appeals of Richmond*, 946 F.Supp. 1225, 1237 (E.D.Va.1996) ("It is well established that there is no substantial burden placed on an individual's free exercise of religion where a law or policy merely 'operates so as to make the practice of [the individual's] religious beliefs more expensive.'") (quoting *Braunfeld v.*

Brown, 366 U.S. 599, 605, 81 S.Ct. 1144, 6 L.Ed.2d 563, (1961) (plurality opinion)). Otherwise, compliance with RLUIPA would require municipal governments not merely to treat religious land uses on an equal footing with nonreligious land uses, but rather to favor them in the form of an outright exemption from land-use regulations. Unfortunately for Appellants, no such free pass for religious land uses masquerades among the legitimate protections RLUIPA affords to religious exercise.

Though the substantial burden and nondiscrimination provisions are operatively independent of one another, RLUIPA's governmental discretion provision, 42 U.S.C. § 2000cc-3(e), upon which the district court relied in order to find that the February 2000 CZO amendments corrected any violation of the substantial burden provision, appears not to reflect this distinction. That subsection provides, in part, that "a government may avoid the preemptive force of *any provision* of [RLUIPA] by changing the policy or practice *that results in a substantial burden* on religious exercise." 42 U.S.C. § 2000cc-3(e) (emphasis added). Rather than remove any substantial burden on religious exercise, however, the February 2000 amendments simply place churches on an equal footing with nonreligious assembly uses, thereby correcting any potential violation of the nondiscrimination provision. Despite subsection 2000cc-3(e)'s reference to removal of a "substantial burden," we read it to afford a government the discretion to take corrective action to eliminate a nondiscrimination provision violation, whether or not it was the result of a substantial burden on religious exercise. Thus do we find that, under RLUIPA's governmental discretion provision, the February 2000 amendments to the CZO render RLUIPA's nondiscrimination provision inapplicable to this case.[6]

---

[6] Appellants also challenge the district court's ruling that their claims under the pre-2000 CZO are moot. They claim that churches, like other

Insofar as Appellants cannot demonstrate on these facts that the CZO substantially burdens religious exercise, and because the February 2000 Amendments to the CZO bring it into compliance with RLUIPA's nondiscrimination provision, Appellants fail to make a sufficient showing on essential elements of their RLUIPA claims. Chicago is therefore entitled to summary judgment on those claims.

Having found RLUIPA inapplicable to the facts of this case, we need not address the issue of RLUIPA's constitutionality, raised by the parties as well as the United States of America, as Intervenor, and various Amici Curiae.

II. Constitutionality of the Chicago Zoning Ordinance

Under the Free Exercise Clause of First Amendment of the United States Constitution, made applicable to state and local governments by the Fourteenth Amendment, no law may prohibit the free exercise of religion. Prior to RLUIPA's enactment, two Supreme Court decisions held that no Free Exercise Clause violation results where a burden on religious exercise is the incidental effect of a neutral, generally applicable, and otherwise valid regulation, in which case such regulation need not be justified by a compelling governmental interest. *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S.Ct. 1595,

---

nonreligious assembly uses, should have been permitted uses in all zones, in which case plaintiff churches would not have been subject to Special Use approval procedures. They allege damages resulting from the costs associated with these procedures. This argument ignores the fact that the primary effect of the 2000 amendments was to impose similar restrictions on non-religious assembly uses, rather than to relax restrictions on churches. Appellants cannot demonstrate that the amended CZO recognizes any preexisting right of churches to operate in B, Z, or M zones. The amendments simply place restrictions on nonreligious assembly uses that are similar to or greater than those facing religious uses. As such, the district court correctly concluded that Appellant's pre-2000 CZO claims are moot.

108 L.Ed.2d 876 (1990); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993). Appellants cite *Smith* and *Hialeah* as additional authority for application of the compelling governmental interest and least restrictive means tests to the CZO, not unlike those urged under RLUIPA.

Appellants first argue that the CZO lacks facial neutrality because, like the law at issue in *Hialeah,* the CZO "refers to a religious practice"—use of property as a church—"without a secular meaning discernable from the language or context." 508 U.S. at 530, 113 S.Ct. 2217. In that case, the City of Hialeah reacted to the intention of practitioners of the Santería religion to establish a church within city limits by passing ordinances banning public ritual sacrifice, a distinguishing element of the Santería religious tradition. The Court explained that a law is not neutral if its object "is to infringe upon or restrict practices because of their religious motivation," and then found that the *Hialeah* ordinances' use of the words "sacrifice" and "ritual", which have "strong religious connotations," was evidence of their purposeful targeting of Santería practices. Appellants assert by analogy that the CZO's explicit inclusion of "church" among the various land uses it regulates indicates that it discriminates against churches on its face. Unlike the *Hialeah* ordinances, however, the text of the CZO includes "church" as just one among many and varied religious and nonreligious regulated uses.[7] More importantly, nothing in the record suggests, nor

[7] The variety of regulated uses specifically referenced in the text of the CZO can be gleaned from the following non-exhaustive list of examples: dwellings, nurseries, rectories, parish houses, golf courses, libraries, convents, monasteries, schools, parks, playgrounds, day care centers, hospitals, clubs, lodges, restaurants, wireless communications facilities, cemeteries, parking lots, hotels, photography studios, pet shops, fraternity houses, museums, correctional institutions, tattoo parlors, pawn shops, taverns, kiddie parks, inter-track wagering facilities, earth station

do Appellants articulate in anything but conclusory terms, that the object and purpose of the CZO are anything other than those expressly stated therein. *See* 17 MUN. CODE CHI. § 2.

In addition to their facial challenge under the Free Exercise Clause as interpreted in *Hialeah,* Appellants allege that the CZO was not neutrally applied to His Word during the course of Alderman Huels' successful efforts to initiate the rezoning of 1616 West Pershing Road.[8] While they concede that Alderman Huels may not be held personally liable for his actions based on our decision in *Biblia Abierta,* 129 F.3d at 901-02, Appellants argue that his actions were legislative acts which improperly targeted His Word. However,

> [m]unicipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered. The fact that a particular official—even a policymaking official—has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion.

Pembaur v. Cincinnati, 475 U.S. 469, 481-82, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986). Here, the possibility that Alderman Huels' motives for wanting to have the property rezoned were illicit in no way demonstrates that the City Council and the Mayor, who have final authority under state law to enact city ordinances, *see* 65 I.L.C.S. §§ 5/1-2-1(2),

---

antennas, frozen food lockers, live bait stores, banks, barbershops, and paint pellet arenas.

[8] In a single sentence, Appellants also allege due process and equal protection violations as a result of the rezoning of 1616 West Pershing Road. Though it is difficult even to evaluate claims offered in terms as conclusory as these, we find them meritless for the same reasons that we are unmoved by Appellants' Free Exercise claims.

endorsed any such motives. Absent some evidence that the policy-making body, in this case the City Council, approved both the rezoning *and* the illicit motivation therefor—and Appellants offer none—Chicago cannot be held liable for Alderman Huels' actions. *See, e.g.*, *City of St. Louis v. Praprotnik*, 485 U.S. 112, 128-30, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988) (plurality opinion); *id.* at 140-42, 108 S.Ct. 915 (Brennan, J., concurring in the judgment).

Appellants also contend that the CZO is not generally applicable, in that the Special Use, Map Amendment, and Planned Development processes create discretionary, individualized exemptions to the CZO which are then impermissibly withheld from churches. As support for this proposition, they cite the Supreme Court's pronouncement that "[i]n circumstances in which individualized exemptions from a general requirement are available, the government 'may not refuse to extend that system to cases of "religious hardship" without compelling reason.'" *Hialeah*, 508 U.S. at 537, 113 S.Ct. 2217 (*quoting Smith*, 494 U.S. at 884, 110 S.Ct. 1595 (citation omitted)). Even assuming, *arguendo*, that the burdens incidental to churches seeking Special Use, Map Amendment, or Planned Development approval amount to "religious hardship" within the meaning of the Court's decision in *Hialeah*, Appellants appear to confuse exemption from a particular zoning provision (in the form of Special Use, Map Amendment, or Planned Development approval) with exemption from the procedural *system* by which such approval may be sought. Under the CZO, these alternate avenues of zoning approval are not merely *available* to any would-be applicant, as *Hialeah* requires. They are mandatory. In short, no person, nor any nonconforming land use, is exempt from the procedural system in place for Special Use, Map Amendment, or Planned Development approval specifically, or the CZO generally. Furthermore, the experiences of plaintiff churches Christ Center and Christian Bible, each of which was initially denied—and subsequently granted—

Special Use approval, demonstrates that Chicago has extended Special Use exemptions to churches. It is clear to this Court that it is neither the policy nor the practice of Chicago to refuse to extend to churches its system of individualized exemptions and, thus, that the CZO is a generally applicable system of land-use regulation.

In *Smith,* the Supreme Court noted that, in cases implicating the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and freedom of association, the First Amendment may subject the application to religiously motivated action of a neutral, generally applicable law to a heightened level of scrutiny. *Smith*, 494 U.S. at 881-82, 110 S.Ct. 1595. Seizing upon this principle, Appellants maintain that their Free Exercise claim involves hybrid rights of free exercise, freedom of speech, freedom of assembly, and equal protection, such that Chicago must justify the CZO's incidental burdens on church location with a compelling state interest. Based on the analyses of Appellants' speech, assembly, and equal protection claims that follow, however, we find them individually lacking the merit necessary to withstand summary judgment. We agree with the Court of Appeals for the Ninth Circuit that "a plaintiff does not allege a hybrid rights claim entitled to strict scrutiny analysis merely by combining a free exercise claim with an utterly meritless claim of the violation of another alleged fundamental right." *Miller v. Reed*, 176 F.3d 1202, 1207-08 (9th Cir.1999). *Accord, e.g., Swanson v. Guthrie Independent School District*, 135 F.3d 694, 700 (10th Cir.1998); *Brown v. Hot, Sexy and Safer Productions, Inc.*, 68 F.3d 525, 539 (1st Cir.1995); *Kissinger v. Board of Trustees*, 5 F.3d 177, 180 (6th Cir.1993). Appellants have identified no constitutionally protected interest upon which the CZO infringes, as they must in order to establish a hybrid rights claim requiring heightened scrutiny.

Of Appellants' remaining constitutional claims, the first alleges that the CZO violates Appellants' First Amendment rights to freedom of speech and freedom of assembly because the CZO is neither (i) content neutral nor (ii) narrowly tailored to serve a legitimate governmental objective and (iii) does not leave open ample channels of alternative communication. *See Ward v. Rock Against Racism*, 491 U.S. 781, 782, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (articulating these three criteria for valid time, place, and manner restrictions on speech and assembly). Appellants state in conclusory terms that the CZO discriminates against religious uses, is "irrational and arbitrary," restricts churches to R zones, and is not narrowly tailored. They also state that the CZO's requirement that churches occupying more than two acres obtain Planned Development approval creates a practical ban on large churches. As discussed previously, the CZO is neutral and generally applicable and places churches on a footing equal with, if not superior to, that of nonreligious assembly uses. Similarly, to the extent that the CZO incidentally regulates speech or assembly within churches, such regulation is motivated not by any disagreement that Chicago might have with the message conveyed by church speech or assembly, but rather by such legitimate, practical considerations as the promotion of harmonious and efficient land use. In this respect it is content neutral. In order to satisfy the requirement that it is narrowly tailored, "a regulation need not be the least restrictive or least intrusive means." *Ward*, 491 U.S. at 798, 109 S.Ct. 2746. It need only further "a substantial government interest that would be achieved less effectively absent the regulation." *Id.* at 799, 109 S.Ct. 2746. There is no question that Chicago—like any population center—has a substantial interest in regulating the use of its land and that the CZO promotes that interest. We are also unpersuaded by Appellants' implicit suggestion that the restriction of church use as of right to R zones leaves churches with insufficient channels of communication. Not

only may churches freely disseminate religious speech in a majority of Chicago land zoned for development, but they may also disseminate—and, in the cases of plaintiffs Christ Center and Christian Bible, have in fact disseminated—religious speech in B and various C districts with Special Use approval. Similarly, the Planned Development approval process provides larger churches with ample opportunity to locate within Chicago in a manner consistent with the CZO's legitimate, stated purposes. For these reasons, Appellants' First Amendment freedom of speech and freedom of assembly claims are without merit.

Appellants further argue that the CZO violates the Equal Protection Clause of the Fourteenth Amendment—which provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws"—by treating churches in a manner less favorable than that of nonreligious assembly uses. It is the well established law of this Circuit that, "[a]bsent a fundamental right or a suspect class, to demonstrate a viable equal protection claim in the land use context, a plaintiff must demonstrate governmental action wholly impossible to relate to legitimate governmental objectives." *Forseth v. Village of Sussex*, 199 F.3d 363, 370-71 (7th Cir.2000); *see also City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (unless a statute classifies by race, alienage, or national origin or impinges on fundamental constitutional rights, "[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest"). Appellants urge us to elevate the level of scrutiny under which we review their equal protection claim against the CZO because the regulation of a church's use of land necessarily implicates the fundamental right of freedom of religious exercise. As a preliminary matter, we are quick to reiterate our earlier determination that any burdens on religious exercise imposed by the CZO are both incidental

and insubstantial. Furthermore, this court has held that the fundamental rights theory of heightened equal protection scrutiny applies only to laws that effect "grave interference with important religious tenets or . . . affirmatively compel [congregants] to perform acts undeniably at odds with fundamental tenets of their religious beliefs." *Griffin High School v. Illinois High School Athletic Assoc.*, 822 F.2d 671, 674 (7th Cir.1987). Whatever the obstacles that the CZO might present to a church's ability to locate on a specific plot of Chicago land, they in no way regulate the right, let alone interfere with the ability, of an individual to adhere to the central tenets of his religious beliefs. As the district court adroitly noted, the CZO's limitations on church location are "not the regulation of belief, any more than regulating the location of the *Chicago Tribune* building is the regulation of the newspaper's [F]irst [A]mendment-protected product." *Civil Liberties for Urban Believers*, 157 F.Supp.2d at 908.

Viewed through the lens of the *Cleburne* and *Forseth* rational basis analyses, Chicago's system of land-use regulation satisfies the requirements of the Equal Protection Clause. In general, a zoning ordinance imposing "restrictions in respect of the use and occupation of private lands in urban communities" such as the "segregation of residential, business, and industrial buildings" satisfies the rational basis test as "a valid exercise of authority." *Village of Euclid v. Ambler Realty Company*, 272 U.S. 365, 386-87, 394, 397, 47 S.Ct. 114, 71 L.Ed. 303 (1926). Here, Chicago permits churches to locate in R districts as of right, while requiring Special Use approval in B and most C districts, not only to promote the general public welfare and to protect the character, stability, order, and efficient development of Chicago's varied areas, but also to prevent overcrowding, to limit street congestion, and to conserve the taxable value of city land. 17 MUN. CODE CHI. § 2. Moreover, the CZO makes available avenues by which exceptions for nonconforming uses may be sought (and has made such exceptions in the cases of two

plaintiff churches who applied for Special Use approval). Though the end result of this zoning scheme may be to afford churches better opportunities for location in R districts than B, C, or M districts, under the amended CZO churches still fare better than many other nonreligious assembly uses that are treated equally in B, C, and M districts but excluded from R districts. To the extent that the CZO treats churches any differently from nonreligious assembly uses, it does not disfavor churches. More importantly, any such difference is rationally related to Chicago's legitimate interest in regulating land use within its city limits. The CZO thus complies with the requirements of the Equal Protection Clause.

Finally, Appellants challenge the district court's analysis of their Fourteenth Amendment procedural due process claim.[9] Specifically, Appellants suggest that the district court's characterization of their claim against the Special Use approval procedures as one involving property rights, rather than any particular use or fundamental activity, is at odds with an earlier district court finding that Appellants' due process claim "asserted a fundamental liberty interest in their free exercise of religion, freedom of speech, and freedom of assembly." *See Civil Liberties for Urban Believers v. Chicago*, 1997 WL 94731, No. 94 C 6151 (N.D.Ill. Feb. 28, 1997) (memorandum opinion and order denying Chicago's motion to dismiss multiple claims). Appellants disregard the fact that this language comes from an order denying Chicago's motion to dismiss Appellants' due process claims pursuant to Rule 12(b)(6) of the FRCP. At the summary judgment stage, the district court's finding that a claim is properly stated for Rule 12(b)(6) purposes has no effect on its determination of the merits of that claim. Viewing the facts in a light most favorable to Appellants, the district court properly determined that, because Appellants challenged the

---

[9] "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV, § 1.

alleged vagueness of the zoning procedures and standards in a manner that any property owner might so do irrespective of a particular property use or fundamental liberty, the claim focused on property rights rather than Appellants' right to worship. The district court then relied upon *River Park v. City of Highland Park*, 23 F.3d 164 (7th Cir.1994), to determine that any facial due process attack on the CZO must be made in state court. As we stated in that case, in which a plaintiff corporation alleged that Highland Park's politically motivated refusal to act on its zoning application bankrupted the corporation and deprived it of procedural due process,

> Federal courts are not boards of zoning appeals [and] the procedures "due" in zoning cases are minimal. Cities may elect to make zoning decisions through the political process. . . . Highland Park made a political decision in a political fashion, employing procedural maneuvers that prevented the question from reaching the floor for a vote. . . . [Plaintiff] may not have received the process Illinois directs its municipalities to provide, but the Constitution does not require state and local governments to adhere to their procedural promises. Failure to implement state law violates that state law, not the Constitution; the remedy lies in state court.

River Park, 23 F.3d at 165-67 (citations omitted). Here, too, the CZO and its special approval procedures provide Appellants with all the legislative process that is due. Moreover, as the district court noted, the CZO expressly provides for the review of zoning decisions by the Illinois Circuit Courts. *See* 17 MUN. CODE CHI. § 11.3-4; 65 I.L.C.S. § 5/11-13; 735 I.L.C.S. 5/3-104. As such, Appellants cannot prevail on their due process claim.

CONCLUSION

Drawing all factual inferences in Appellants' favor, we nonetheless conclude that their statutory and constitutional claims challenging the Chicago Zoning Ordinance are

without merit. We therefore AFFIRM the district court's order granting the City of Chicago's motion for summary judgment.

POSNER, Circuit Judge, dissenting.

This is a difficult case, but I have come to the conclusion that the restrictions that Chicago's zoning ordinance places on churches (a term that I use broadly to include any religion's place of worship) violate the equal protection clause of the Fourteenth Amendment. I do not address the other grounds on which the plaintiffs attack the restrictions. The discussion of those grounds occupies most of the majority opinion, which devotes little space to what seems to me to be the strongest ground of the appeal.

The ordinance creates three zones so far as relates to the equal protection issue. (I am using the term "zones" functionally rather than to designate categories in the zoning ordinance, which, as is apparent from the majority opinion, is extremely complicated.) The first "zone" is residential. Churches can locate there without having to obtain a permit from the zoning board, as can a number of other nonresidential entities, such as clubs, restaurants, schools, libraries, and drugstores, though restaurants and drugstores only in high-rise apartment buildings. Other nonresidential land uses in the residential zone, either require a permit or are banned outright. The second zone, which I shall call "commercial," is for business and other commercial uses, including not only office buildings and retail stores but also wholesale outlets, warehouses, and light manufacturing, but excluding certain transportation facilities and heavy manufacturing. In the commercial zone, churches require a permit. Last is a zone reserved for transportation facilities and heavy manufacturing, which I shall call the "manufacturing" zone. In it churches are flatly forbidden, although bars, restaurants, and union lodges are freely permitted.

The question is whether the City's restrictions on where churches may locate are rational. But "rationality" in the law of equal protection is not in fact a single standard, though the courts have been coy about admitting this. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985), like this a zoning case, and decisions following it such as *Congregation Kol Ami v. Abington Township*, 309 F.3d 120, 133-44 (3d Cir.2002), and *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 471-72 (8th Cir.1991), identify a category of sensitive uses or activities, where judges are to be more alert for unjustifiable discrimination than in the usual case in which government regulations are challenged on equal protection grounds. See *Lawrence v. Texas*,—U.S.—,123 S.Ct. 2472, 2484-85, 156 L.Ed.2d 508 (2003) (O'Connor, J., concurring); cf. *Plyler v. Doe*, 457 U.S. 202, 224-30, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982). It is true that *Cleburne* refused to deem mental retardation a "quasi-suspect classification" warranting a standard of review more searching than that of rationality, see *City of Cleburne v. Cleburne Living Center, Inc.*, *supra*, 473 U.S. at 442-46, 105 S.Ct. 3249 and on this basis the City of Chicago in our case cites the decision in support of its position. But one has only to read a little further in the *Cleburne* opinion to realize that the Court was not treating the zoning discrimination at issue there as it would have treated a discrimination in the taxation of railroads or the zoning of bowling alleys. Compare *Fitzgerald v. Racing Ass'n of Central Iowa*,—U.S.—,123 S.Ct. 2156, 2159-61, 156 L.Ed.2d 97 (2003). The ordinance challenged in *Cleburne* required a permit (which was denied) for a home for mentally retarded people in a zone in which hospitals and nursing homes, along with private houses and a variety of other residential facilities, were allowed without permit. The mentally retarded arouse distaste and even fear among many people, but the Court said that "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a

zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like." *City of Cleburne v. Cleburne Living Center, Inc.*, *supra*, 473 U.S. at 448, 105 S.Ct. 3249. The Court went through the other justifications that Cleburne had offered for the discrimination, found them wanting, and invalidated the ordinance.

The majority opinion in *Cleburne* is deficient in candor. Cf. Dennis J. Hutchinson, "More Substantive Equal Protection? A Note on Plyler v. Doe," 1982 *Supreme Court Review* 167, 168, 179, 194. As a separate opinion joined by three of the Justices pointed out, "The Court holds the ordinance invalid on rational-basis grounds and disclaims that anything special, in the form of heightened scrutiny, is taking place. Yet Cleburne's ordinance surely would be valid under the traditional rational-basis test applicable to economic and commercial regulation. In my view, it is important to articulate, as the Court does not, the facts and principles that justify subjecting this zoning ordinance to the searching review—the heightened scrutiny—that actually leads to its invalidation. . . . [T]he Court does not label its handiwork heightened scrutiny, and perhaps the method employed must hereafter be called 'second order' rational-basis review rather than 'heightened scrutiny.' But however labeled, the rational-basis test invoked today is most assuredly not the rational-basis test of *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955), *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 79 S.Ct. 437, 3 L.Ed.2d 480 (1959), and their progeny." *City of Cleburne v. Cleburne Living Center, Inc.*, *supra*, 473 U.S. at 456, 458, 105 S.Ct. 3249.

We should follow what the Supreme Court does and not just what it says it is doing. The Court rejects a "sliding scale" approach to equal protection in words but occasionally accepts it in deeds. *Cleburne* instantiates though it does not

articulate the proposition that discrimination against sensitive uses is to be given more careful, realistic, skeptical scrutiny by the courts than discrimination against purely commercial activities. *Romer v. Evans*, 517 U.S. 620, 634-35, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996); cf. *Lawrence v. Texas*, *supra*, 123 S.Ct. at 2482. And while it is true that the Court has rejected the proposition that "*Cleburne* stands for the broad proposition that state decisionmaking reflecting 'negative attitudes' or 'fear' necessarily runs afoul of the Fourteenth Amendment," adding that "although such biases may often accompany irrational (and therefore unconstitutional) discrimination, their presence alone does not a constitutional violation make," *University of Alabama v. Garrett*, 531 U.S. 356, 367, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001), we should give due weight to "necessarily" and "alone." Previous decisions of this court and other courts of appeals have recognized that the *Cleburne* line of cases expands the boundaries of "rationality" review. See *Milner v. Apfel*, 148 F.3d 812, 816-17 (7th Cir.1998); *Pontarelli Limousine, Inc. v. City of Chicago*, 929 F.2d 339, 341-42 (7th Cir.1991); *Ramos v. Town of Vernon*, 331 F.3d 315, 320 (2d Cir.2003); *Able v. United States*, 155 F.3d 628, 634 (2d Cir.1998).

Churches are no less sensitive a land use than homes for the mentally retarded, as both *Congregation Kol Ami v. Abington Township, supra*, and *Cornerstone Bible Church v. City of Hastings, supra*, recognize, though the reason is different. The mentally retarded are victims of irrational fears and cruel scorn; they are shunned. Religious people are not shunned, but religion arouses strong emotions, sectarian rivalry is intense and often bitter, and the mixing of religion and government is explosive. When government singles out churches for special regulation, as it does in the Chicago ordinance, the risk of discrimination, not against religion as such—Chicago is not dominated by atheists—but against particular sects, is great enough to require more careful

judicial scrutiny than in the ordinary equal protection challenge to zoning.

Chicago's ordinance discriminates in favor of well-established sects. Not only did they acquire the land on which their churches are built in residential areas when such land was relatively cheap and abundant, and therefore affordable by noncommercial entities, such as churches (and there are of course some wealthy churches); in addition, because nonconforming uses are grandfathered, the churches that have managed to get permission to build over the years in nonresidential zones are untouchable. But what of new, small, or impecunious churches, such as the 40 to 50 obscure sects, one of which has only 15 members, that compose the principal plaintiff, Civil Liberties for Urban Believers? And obscure they are. It is telling that of the six other named plaintiffs—Christ Center (150 members), Christian Covenant Outreach Church (ministering to teenagers and former gang members), His Word Ministries to All Nations, Christian Bible Center (35 members), Church on the "Way" Praise Center, and Monte de Sion Church—only one (Christian Bible Center) is on the city's list of area churches. See http://www.thecityofchicago.org/church/.

As David Hume would have predicted, the greater vitality of American religion than of religion in countries in which there is an established church or churches owes much to our unwillingness to allow government to favor particular sects. Laurence R. Iannaccone, Roger Finke & Rodney Stark, "Deregulating Religion: The Economics of Church and State," 35 *Econ. Inquiry* 350 (1997); Iannaccone, "The Consequences of Religious Market Regulation: Adam Smith and the Economics of Religion," 3 *Rationality & Soc'y* 156 (1991). By impairing religious competition, such favoritism turns many people—those not comfortable with the creed or clergy or congregants of the favored church—off religion.

Religious competition presupposes free entry into the religious "marketplace." A new church is unlikely, however, to have the resources necessary for building its place of worship in a residential area other than a slum, especially as the Chicago ordinance requires that the church provide parking, which will mean that unless its building is tiny it will have to acquire more than one city lot. A church that wants to build in the commercial zone, where land is cheaper, must obtain a special permit; and if it wants to build in the manufacturing zone, it is out of luck unless it can procure an amendment to the zoning ordinance. At issue in *Congregation Kol Ami v. Abington Township* was a zoning ordinance that *excluded* churches from residential areas; this is some evidence that the City is wrong to suppose that it is any longer the case that churches fit better into residential than nonresidential areas. The phenomenon of the "storefront church"—an apt description of the churches in this case—reflects both the inability of a new, small church to afford to build in a residential area and the fact that a new church needs to advertise its presence, which it can do at little cost just by being located in a commercial area, where there are more passersby than in a residential area.

> Small storefront or house churches can be found in many places in the city. A recent article by George Gallup reports that 40% of all American adults meet in small religious groups. Not surprisingly, a large number of these groups are in fact storefront or house churches which revolve around Bible study, prayer, and Sunday school.
>
> This is not happening in just a Christian context. Within the New Age movement, Muslim, Hindu, and even Jewish traditions, small groups are gathering in storefront meeting houses. These storefront worship spaces will continue to grow for many reasons, but the one that will affect them even more than group dynamics

> is city planning. As tighter zoning laws are pass[ed] in Boston and real estate prices continue to sky-rocket, the only place for churches to turn to are existing commercial spaces.

Robert L. Lewis, Jr., "Ministry Research Project: Storefront Churches of Boston; A Photographic Study of Selected Storefront and Home Churches in the City of Boston," http://www.bu.edu/ccrd/research/completed/storefront.html. The article is about Boston but the analysis in it is equally applicable to Chicago.

Granted, Chicago's prohibition against locating a church in the commercial zone is not absolute. A permit can be sought. But obtaining one is costly for a marginal enterprise; the zoning board enjoys broad discretion in deciding whether to grant or deny a permit; and a public hearing is required at which opposition to the church's application for a permit is predictable because churches do not enhance commercial activity (see Lucinda Harper, "Storefront Churches: The Neighbors Upscale Stores Don't Love," *Wall St. J.*, Mar. 15, 2000, at B1)—this is one of the reasons the City offers in defense of the ordinance. It is a bad reason, but it is the kind of reason likely to impress the zoning authorities.

It is a bad reason because while it is true that a church is less likely to enhance a commercial area than a Bloomingdale's or a Four Seasons is, there are very few blocks in Chicago that are purely commercial. A combination of grandfathering, the grant of special permits, and changes in zoning law has produced a crazy quilt of land uses. On Michigan Avenue near our courthouse—an area zoned commercial as I have been using the term—retail stores, restaurants, hotels, colleges, office buildings, and clubs jostle cheek by jowl. If one of the clubs or colleges were replaced by a church, the commercial life of Michigan Avenue would not be affected, although the "tone" of the avenue might be lowered by a *storefront* church. (As a matter of fact, there *is* a

church on Michigan Avenue—the Fourth Presbyterian Church. See http://www.fourthchurch.org/.) For remember those "negative attitudes" of which the Court spoke in *Cleburne?* Not only are mainline churches apt to be hostile to upstarts such as the members of Civil Liberties for Urban Believers, and particularly to storefront churches, but even people who are not caught up in sectarian rivalries might consider the presence of a church rather a downer in a "fast" district, such as Old Town. Indeed, a permit for one of CLUB's members was denied because it was thought that the presence of a church would impede the transformation of the area into a "nightclub district."

The City's brief offers the further, but absurdly paternalistic, argument that it is bad for the churches themselves to be located in commercial or industrial areas, because of noise and commotion. Obviously that is a judgment for the church to make rather than government, by trading off the cost to the church of noisy and profane surroundings against the benefits in lower costs of land acquisition and proximity to sinners, including prostitutes, drug addicts, and gang members, whose souls are particularly in need of saving. At oral argument the City's lawyer pressed another point, that the mysterious exclusion of churches from the manufacturing zone is justified by the fact that if they clustered there they might try to expel the factories by bringing a nuisance suit. Because Illinois rejects the doctrine of "coming to the nuisance," *City of Pana v. Central Washed Coal Co.*, 260 Ill. 111, 102 N.E. 992, 998 (1913); *Oehler v. Levy*, 234 Ill. 595, 85 N.E. 271, 273-74 (1908); see also *Wheat v. Freeman Coal Mining Corp.*, 23 Ill.App.3d 14, 319 N.E.2d 290, 294 (1974), it is not a defense to a nuisance suit that the nuisance was there before the plaintiff. The lawyer's vision of churches concentrating in the manufacturing zone and then bringing a nuisance suit to transform it into—what, a religious zone?—is fanciful. But even if it were realistic, the City, which is a part of Illinois state government from the

standpoint of the application of the equal protection clause, cannot defend discrimination by arguing that it is coerced by state law. Otherwise a state could pass a law requiring the police to beat up anyone they arrested, and police sued for violating the Fourth Amendment for using excessive force in effecting seizures of the person would have a defense, which no one believes. The state can untie the City's hands by authorizing a "coming to the nuisance" defense, either generally or just for the benefit of manufacturers whose factories are in cities. Anyway a nuisance suit would not succeed unless the plaintiff could show a net increase in land values from abating the nuisance; and if so this would imply that the City was better off for the suit.

The City's final argument is that the zoning ordinance represents a "global bargain" whereby churches get preferred treatment in the residential zone and secular uses get preferred treatment in the commercial zone. If one assumes, as I would, that the exclusion of commercial uses from the residential zone is rational (deny that, and one condemns virtually all zoning as irrational), the exclusion of churches from the commercial zone would be rational if their presence would crowd out commercial users. But that is an absurd suggestion. A slightly more realistic worry would be that if churches are allowed to bid for land zoned commercial, the price of such land will rise, to the detriment of commercial users of it, because the amount of land is fixed and the demand would have increased. But the aggregate demand of churches for land zoned commercial is too slight in relation to the amount of that land for allowing them to bid on it to affect the price noticeably.

Thus far I have been discussing the ordinance as it was amended in 2000 in virtual acknowledgment that its predecessor was in violation of the Constitution. For the predecessor ordinance allowed fraternal lodges and other clubs, community centers, and other meeting places to locate

in the commercial zone without obtaining a permit. (The amendment eliminated this privilege, though colleges, union lodges, libraries, and funeral homes, along with the conventional business and commercial establishments, retain it.) The only difference between them and churches is that they are secular. There is no difference so far as the use of land is concerned. The "global bargain" defense is particularly questionable as applied to the old ordinance. A church is no more or less suitable for the residential zone than a fraternal lodge and a fraternal lodge no more or less suitable for the commercial zone than a church. The old ordinance discriminated arbitrarily in favor of churches in the residential zone and against them in the commercial zone, thus distorting religious competition in favor of existing and against new churches. The new ordinance retains one completely unreasonable distinction, that between union lodges and churches, putting one in mind of the Spanish Civil War, a struggle between syndicalism and clericalism. The distinction between churches on the one hand and libraries and colleges on the other hand, another distinction retained by the amended ordinance, is only a little more rational.

The plaintiffs filed their suit almost a decade ago, before the ordinance was amended. The amendment did not moot their challenge to the old ordinance because they seek damages for the delay they encountered in obtaining permission to build in desirable locations. If as I contend the requirement of a permit was unconstitutional because it discriminated in favor of fraternal lodges, then the delay the plaintiffs encountered in finding suitable quarters was the consequence of a constitutional violation and the plaintiffs are entitled to damages. As an example of the runarounds that the plaintiffs experienced in obtaining a special permit in the commercial zone, consider the hegira of the Christian Bible Church. From small beginnings (like Christianity itself), meeting in a private home, the congregation in 1988 began meeting in a funeral parlor, hardly an auspicious site. In 1990

it found a suitable building in the commercial zone, but did not apply for a permit after being told that the alderman for the ward in which the building was located would not allow a church at that location. The following year Christian Bible bought a building in another part of the commercial zone, applied for a permit, and was turned down. After trying without success to sell the building, the church renovated it, and while the building was closed for renovations the congregation met in rented quarters or private homes. The renovations completed, Christian Bible applied for and this time received a permit to use the building as its church. By now it was 1993; it had taken three years to find suitable space. As Christian Bible has only 35 members, the burden that the ordinance imposed on it was formidable.

Chicago's zoning ordinance imposes the same severe burden on new churches that the ordinance invalidated in the *Cleburne* case imposed on homes for the mentally retarded, and with no greater justification. In doing so it denied the plaintiffs the equal protection of the laws.

APPENDIX B

UNITED STATES DISTRICT COURT,
N.D. ILLINOIS, EASTERN DIVISION

No. 94 C 6151

C.L.U.B. (CIVIL LIBERTIES FOR URBAN BELIEVERS),
CHRIST CENTER, CHRISTIAN COVENANT OUTREACH CHURCH,
CHRISTIAN BIBLE CHURCH, MOUNT ZION CHURCH,
Plaintiffs,

v.

CITY OF CHICAGO,
Defendant.

March 29, 2002

MEMORANDUM AND ORDER

HIBBLER, District J.

The Court has before it Plaintiff's Motion to Alter or Amend the Judgement of this Court. The motion is fully briefed and thus ready for adjudication. For the following reasons, the Court DENIES Plaintiff's Motion to Alter or Amend the Judgment.

The association Civil Liberties for Urban Believers (C.L.U.B.) and some of its member churches ("Plaintiffs") filed suit against the City of Chicago ("Defendant"). Plaintiffs claim Defendant's zoning policy and procedures restricted Plaintiffs' First Amendment rights to the free exercise of religion, freedom of speech and freedom of assembly and

denied equal protection and due process to Plaintiffs. After over seven years of litigation and numerous opinions issues by both the District Court and Circuit Court, this Court granted Defendant's motion for summary judgment and disposed of the case. *C.L.U.B. v. City of Chicago*, 157 F.Supp.2d 903 (N.D.Ill.2001). Plaintiff has submitted the present motion to revisit and challenge the Court's ruling and opinion.[1]

Standard of Review

Rule 59(e) motions for reconsideration serve a limited function. Under Rule 59(e), the moving party must clearly establish: a significant change in the law has occurred; the court misunderstood the party; the court made its decision outside the adversarial issues presented to the court; the court made an error of apprehension, not reasoning; or significant new facts have been discovered. Fed.R.Civ.P. 59(e); *Russell v. Delco Remy Div.*, 51 F.3d 746, 749 (7th Cir.1995) (citing *Bank of Waunakee v. Rochester Cheese Sales, Inc.*, 906 F.2d 1185, 1191 (7th Cir.1990)). In general, motions for reconsideration cannot be used to introduce new theories or rehash old arguments. *Oto v. Metropolitan Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir.2000). "A 'manifest error' is not demonstrated by the disappointment of the losing party. It is the wholesale disregard, misapplication, or failure to recognize controlling precedent." *Id.* (citation omitted).

---

[1] In its present motion, Plaintiff addressed the private nature of C.L.U.B.'s membership and mentioned the history of property ownership of one of its churches. This information does not change the Court's analysis and application of the relevant law in the present case.

Analysis

The Pertinence of the Pre-February 2000 Zoning Plan

Plaintiffs argue the Court failed to address their Equal Protection claims as applied to Defendant's pre-February 2000 zoning scheme. However, the Court clearly stated in its order that Plaintiffs' Equal Protection claim is evaluated under a "rational basis" standard. *C.L.U.B.*, 157 F.Supp.2d at 909-912. The pre-Amendment zoning scheme complied as a whole with the Equal Protection Clause of the Fourteenth Amendment because the scheme's elements were supported by reasonable distinctions between churches and the other allegedly similar uses. *Id.* at 912. Thus, to the extent it is relevant to the present discussion, the prior zoning plan was constitutional.

Permitted Uses in Manufacturing Zones

Plaintiffs allege the post-February 2000 zoning scheme continues to exclude churches from light manufacturing districts ("M-1") while allowing community centers as permitted uses in these areas. Defendant has established the February 2000 Chicago City Council amendments ("MA-59"), which revised the City's Zoning Ordinance at issue, changed the legal status of "Municipal and Privately-Owned Recreation Buildings or Community Centers" by removing them as permitted uses in manufacturing districts, including M-1.[2] Thus, under the current zoning scheme, churches are treated no worse than a similarly situated non-religious assembly.

---

[2] The Chicago City Council has corrected a previous clerical error in the record to now state unambiguously that MA-59 eliminated recreation buildings and community centers as permitted uses in "M" zones. Since February 2000, Defendant's Zoning Administrator has enforced the amendment as intended and passed, and he corrected the technical oversight.

Religious Land Use and Institutionalized Persons Act § 2(b)(1)

Plaintiffs maintain the Court failed to specifically address their arguments regarding Section 2(b)(1) of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C.A. § 2000cc, et seq.[3] Section 2(b)(1) prohibits Defendant from treating Plaintiffs "on less than equal terms with a nonreligious assembly or institution." As the Court stated in its opinion, the zoning plan does not violate Section 2(b)(1) because Defendant's "zoning scheme must be viewed as a whole, with attention focused as to how the pieces combine to form the complete zoning scheme"; as such, the scheme treats Plaintiffs as well, if not better than similar, non-religious assembly uses. *C.L.U.B.*, 157 F.Supp. 2d at 912. For example, unlike comparable non-religious uses, churches operate in residential ("R") districts as a permitted use and enjoy a unique application process which automatically approves their applications for special use pending for more than 120 days. *See Chicago Zoning Ordinance*, Municipal Code of Chicago, Title 17, Art. 11.10, § 11.10-7.5 (2002).

---

[3] The Court clearly stated Section 2(a)(1) of RLUIPA is inapplicable to the present matter due to Section 5(e), which allows a governmental body to avoid heightened scrutiny if the body removes any substantial burden. As the House Committee of the Judiciary stated when it presented RLUIPA as a bill, "Section 5(e) emphasizes that this Act does not require states to pursue any particular public policy or to abandon any policy, but that *each state is free to choose its own means of eliminating substantial burdens on religious exercise.*" H.R.Rep. No. 106-219, at 30 (1999) (emphasis added). Here, Defendant's February 2000 amendments to the Zoning Ordinance adjusted Defendant's policies concerning special use permits and districts to eliminate any alleged burden.

Buckhannon and Claims for Money Damages

The Court granted Plaintiff's motion to submit supplemental authority, *Buckhannon Board and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources, et al.*, 121 S.Ct. 1835 (2001), in support of the present motion to reconsider. In *Buckhannon*, the Supreme Court stated a court may award statutory attorney fees to the prevailing party who secures a judgment on the merits or court-ordered consent decree; as a result, courts may no longer follow the "catalyst rule," wherein a court may award fees to a plaintiff who secures a voluntary change or cessation in the defendant's conduct. *Id.* at 1838-1843. Plaintiff asserts *Buckhannon* requires the Court to address the constitutionality of Defendant's pre-February 2000 zoning scheme to determine if Plaintiffs are entitled to monetary damages, attorneys fees and costs. *Id.* at 1842-43. However, as stated above and in the Court's earlier opinion, the Court has already determined the pre-February 2000 scheme met all constitutional tests.

Further, Plaintiffs lack standing to seek monetary damages regarding the pre-February 2000 zoning plan. First, Judge Andersen previously determined C.L.U.B. is an association and thus lacks standing to seek monetary damages on behalf of individual churches. *C.L.U.B. v. City of Chicago*, No. 94 C 6151, 1996 WL 89241, at *14 (N.D.Ill.Feb.27, 1996) ("C.L.U.B. may have associational standing to pursue forms of prospective relief which do not require individualized proof but may not pursue money damages."); *see also Retired Chicago Police Ass'n v. City of Chicago*, 76 F.3d 856, 863 (7th Cir.1996); *Sanner v. Board of Trade of City of Chicago*, 62 F.3d 918, 923 (7th Cir.1995); *Irish Lesbian and Gay Org. v. Giuliani*, 143 F.3d 638, 650 n. 5 (2nd Cir.1998).

Second, the remaining individual church Plaintiffs were not injured by the specific provisions of the zoning scheme they have challenged. Their monetary damage claims are founded

upon the fact that, unlike the post-February 2000 scheme, the pre-February 2000 zoning scheme allowed additional non-religious assembly uses in "M" zones; the individual churches maintain they suffered specific monetary injuries as a result of this unconstitutional difference in the previous plan. However, Plaintiffs' alleged injuries cannot be traced to the section of the pre-February 2000 zoning scheme that excluded churches from "M" zones. Rather, Plaintiffs have alleged they were damaged by the scheme's requirement that they obtain special use permits to operate in "B" and "C" districts and not the portion of the old ordinance that excluded churches from "M" zones. The requirement to obtain a special use permit to operate in "B" and "C" zones was not altered by the February 2000 amendments and thus remains in the current scheme; moreover, the Court upheld the special use permit requirements in its March 30 opinion. *C.L.U.B.*, 157 F.Supp.2d at 912.

If the remaining church Plaintiffs' injuries were causally related to the prior "M" classification, then these parties might have claims for money damages regarding the pre-February 2000 zoning scheme. However, Christ Center, Christian Covenant Outreach Church, Christian Bible Center, and Mount Zion Church were not legally injured by the exclusion of churches from "M" zones. Instead, each church has alleged it was injured by the requirement that it obtain a special use permit to operate in "B" and "C" districts.[4] *See* Pls.' Aff., Ex. A-2,3,5,7; Pls. Fourth Am. Compl. Plaintiffs identified properties in "B" and "C" districts in which they were interested and they maintain the permit requirement discouraged them from buying those properties. Plaintiffs

---

[4] In his February 1996 motion to dismiss opinion, Judge Andersen held Christ Center and Christian Bible Church had standing to challenge the special use permit requirements. *C.L.U.B.*, 1996 WL 89241, at *12-13. As noted above and in the Court's March 30 summary judgment opinion, the special use permit requirements have been found constitutional.

have merely alleged abstract and conjectural claims of hardship as a result of the pre-February 2000 "M" classifications and have failed to allege that, but for the exclusion of churches from "M" districts, they would have purchased specific properties.[5] *See Love Church v. City of Evanston*, 896 F.2d 1082, 1086 (7th Cir.1990) (court held plaintiff, who alleged it was injured by a town ordinance that required churches to obtain special use permits in all city districts, lacked standing because the church's "speculative claims cannot constitute distinct and palpable injury for purposes of standing."); *see also C.L.U.B.*, 1996 WL 89241, at *8-13. Thus, regarding the pre-February 2000 zoning scheme, C.L.U.B. and the individual Plaintiffs lack standing to allege monetary damage claims.

CONCLUSION

For the above reasons, the Court DENIES Plaintiffs' Motion to Alter or Amend the Judgment of the Court.

IT IS SO ORDERED.

---

[5] Christ Center identified property in a M-1 zone and maintains it considered locating there, but the church did not purchase the property or even apply for a permit. (Pl. Aff. Ex. A-2 at ¶ 20.) Such allegations do not establish a "distinct and palpable" injury fairly traceable to Defendant. *Love Church*, 896 F.2d at 1086 (the Seventh Circuit denied standing to the individual churches and stressed the plaintiffs had never even applied for a special use permit).

APPENDIX C

UNITED STATES DISTRICT COURT
N.D. ILLINOIS
EASTERN DIVISION

No. 94CV6151

C.L.U.B.(CIVIL LIBERTIES FOR URBAN BELIEVERS), CHRIST CENTER, CHRISTIAN COVENANT OUTREACH CHURCH, HIS WORD MINISTRIES TO ALL NATIONS, CHRISTIAN BIBLE CHURCH, MONTE DE SION (MOUNT ZION) CHURCH,
Plaintiffs,

v.

CITY OF CHICAGO,
Defendant.

March 30, 2001
As Amended Oct. 17, 2001

MEMORANDUM AND ORDER

HIBBLER, District Judge.

CLUB and a collection of individual churches ("Plaintiffs") and the City of Chicago ("Defendant") filed cross motions for summary judgment; also, the City filed a motion for summary judgment on Count XIV of Plaintiffs' Fourth Amended Complaint, i.e. the Religious Land Use and Institutionalized Persons Act (RLUIPA). The issues have been fully briefed and thus are now ripe for adjudication. For the following reasons, this Court GRANTS Defendant's motion for summary judgment (doc. # 126), DENIES

Plaintiffs' motion for summary judgment (doc.# 128) and GRANTS Defendant's motion for summary judgment on Count XIV of Plaintiffs' fourth amended complaint (doc. # 151).

BACKGROUND

Prior Opinions and Procedural History

On October 11, 1994, Plaintiffs filed their first complaint in this case; on November 9, 2000, Plaintiffs filed their fourth amended complaint, which is currently before this court. Plaintiffs' prior complaints were the subject of five written opinions by Judge Andersen and a published opinion by the Seventh Circuit Court of Appeals, which held Aldermen William Banks and Patrick Huels to be absolutely protected by legislative immunity for their particular actions related to zoning ordinances. *See C.L.U.B. v. City of Chicago*, No. 94 C 6151, 1996 WL 89241 (N.D.Ill. Feb.27, 1996)("*CLUB I*"), *rev'd in part by Biblia Abierta v. Banks*, 129 F.3d 899 (7th Cir.1997); *C.L.U.B. v. City of Chicago*, No. 94 C 6151, 1996 WL 697630 (N.D.Ill. Nov.20, 1996)("*CLUB II*"); *C.L.U.B. v. City of Chicago*, No. 94 C 6151, 1997 WL 43226 (N.D.Ill. Jan.27, 1997)("*CLUB III*"), *rev'd by Biblia Abierta; C.L.U.B. v. City of Chicago*, No. 94 C 6151, 1997 WL 94731 (N.D.Ill. Feb.28, 1997)("*CLUB IV*"); *C.L.U.B. v. City of Chicago*, No. 94 C 6151, 1997 WL 102552 (N.D.Ill. Mar.6, 1997)("*CLUB V*"), *rev'd in part by Biblia Abierta.*

Chicago Zoning Ordinances

The regulation of land uses within the City is set forth as the Zoning Ordinance in Title 17 of the Municipal Code of Chicago. Generally, the City is divided into several broad use districts: Residence ("R"), Business ("B"), Commercial ("C"), or Manufacturing ("M"). Each zone contains various subdistricts (e.g.R1, R2, R3, etc.); the Zoning Ordinance also sets forth the uses allowed within each sub-district. These

zoning categories apply to all property except that zoned as a Planned Development. Approximately 40% of the City is zoned as R districts, with the remaining parts of the City divided into B, C, or M districts.

Within each sub-district, certain uses are allowed as of right ("permitted uses"), while other uses are allowed as "special uses" and require approval from the City's Zoning Board of Appeals ("ZBA") and still other uses are prohibited under any circumstances. The ZBA will consider an application for a special use permit only after a public hearing is noticed and held, and a written report is prepared and filed with the ZBA by the Commissioner of Planning and Development. Art. 11.10-2. In considering whether to grant a special use permit, the ZBA makes an ad hoc determination as to what impact the special use will have on other entities in the district. Art. 11.10-1. A permit will not be granted unless the special use: (1) complies with public convenience; (2) does not threaten public health, safety, and welfare; (3) does not diminish the value of nearby property; (4) complies with Articles 7, 8, and 9 of the Chicago Zoning Ordinance; and, (5) conforms with applicable regulations in the district. Art. 11.10-4. Further, the Commissioner of Planning and Development may recommend, and the ZBA may consider in its discretion, other factors, e.g. off-street parking and loading. Art. 11.10-5. Upon receiving an application, the ZBA often notifies the alderman of the respective ward for which the special use permit application was filed and may consider the input of the alderman on whether a special use permit should be granted for a particular location. Additionally, the ZBA permits neighbors and community groups to testify at its hearings concerning the pending application. The overall cost of obtaining a special use permit ranges from $4,000 to $5,000; moreover, if property is used in violation of the Zoning Ordinance, the City may impose daily fines and issue injunctions.

In particular, the Zoning Ordinance treats churches as follows: (a) within all R districts, churches are permitted uses as of right; (b) within all B districts, churches are special uses, and thus must obtain a permit to locate in these areas; (c) within C1, C2 and C3 districts, churches are also special uses; and (d) within the C4 district and all M districts, churches are not permitted. Art. 7-10. The treatment of churches today within the various districts is largely the same as it was in 1957, the year in which the Zoning Ordinance was last comprehensively amended.

In each of their complaints, Plaintiffs have argued churches require special use permits to locate in B and C districts, while other similar uses may locate in B, C and M districts as permitted uses. In response to this litigation, the City Council recently amended the Zoning Ordinance as to certain uses Plaintiffs maintain are similar to churches. *Chicago City Council Journal of Proceedings*, February 16, 2000, p. 25997-26013. Under the amended ordinance, "clubs and lodges," "meeting halls," and "recreation buildings and community centers" are now required to obtain special use permits to locate in B and C districts, the same as churches. However, unlike churches, none of these allegedly similar uses are permitted uses in all R districts. Further, with respect to only churches, the amendments to the Zoning Ordinance removed the requirement for a special use permit that an applicant affirmatively demonstrate the proposed use is "necessary for the public convenience at that location." *See Employment Div., Dept. of Human Res. v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990)("[C]ourts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim."). Further, the amended ordinance automatically grants a special use permit if the ZBA does not render a decision within 120 days of the date of a church's application.

Factual History[1]

Plaintiff Civil Liberties for Urban Believers ("CLUB") is an unincorporated association of approximately 40 to 50 churches located in Chicago, Illinois and the surrounding suburbs.[2] CLUB challenges zoning laws it maintains restrict the free exercise of religion and other freedoms of its own members. The individual member churches of CLUB are incorporated as Illinois religious or not-for-profit corporations and range in size from 15 to 15,000 members. In the present action, CLUB and five of its individual church members, Christ Center, Christian Covenant Outreach Church ("Christian Covenant"), His Word Ministries to All Nations ("His Word"), Christian Bible Church ("Christian Bible"), and Monte De Sion Church ("Mount Zion"), allege fourteen counts in their Fourth Amended Complaint arising from zoning challenges.

---

[1] Throughout the documents he has filed with the court, Plaintiff's counsel continues to include plaintiffs and defendants that have been dismissed. For example, Aldermen Huels and Banks were dismissed as defendants from this case by Judge Andersen on March 18, 1998, in response to the Seventh Circuit's decision in *Biblia Abierta*, and yet Plaintiffs' counsel continues to include them in his captions and in his complaint (e.g. Pl. Compl. at 26-27: Plaintiff's prayer for relief requests $1.3 million from Huels). Similarly, the State of Illinois was dismissed as a defendant by Judge Andersen in *CLUB I*, and yet counsel continues to feature the State. *CLUB I*, 1996 WL 89241, at *17. Plaintiff's counsel displays a lack of preparation and organization and risks wasting the court's time and resources.

[2] While it is unclear who its members are or even the precise number of members, the court in *CLUB I* found "CLUB has associational standing to pursue declaratory and injunctive relief on behalf of its members actually injured." *CLUB I*, 1996 WL 89241, at *15.

Christ Center began meeting in a high school auditorium in 1990, but soon experienced difficulties at this location due to various school functions that interrupted weekly worship. As a result, Christ Center began searching for a building to purchase. The church was unsuccessful in locating an appropriate building in any R districts. In the summer of 1992, Christ Center located a suitable building at 1139-43 West Madison in Chicago. The building was located in a C district and Christ Center promptly applied for a special use permit. After completing the application process, Christ Center reached out to gain the support of neighbors and Alderman Theodore Mazola. Most neighbors favored a taxpaying entity in the neighborhood rather than a church and Alderman Mazola stated that he would support the church's special use permit on any street but Madison. The Zoning Board eventually convened a special hearing on September 18, 1992. On October 18, 1992, the special use permit was denied. Christ Center subsequently found a second building in an M district at 123 South Morgan. The owner of the building also agreed to provide financing. However, the Chicago Department of Planning and Development informed Christ Center that it would oppose any rezoning application because the particular area was designated to become an entertainment area and the presence of a church would inhibit such development. Christ Center subsequently choose not to file an application for rezoning. In the fall of 1993, Christ Center obtained property at 4445 South King Drive, successfully obtained a special use permit and now operates a church at this location. Christ Center now claims that it paid substantial sums in attorneys fees, appraisal fees, zoning application charges, title charges and other expenses attempting to find suitable property.

Between 1986 and the summer of 1988, Christian Bible met in a private home. The church eventually outgrew this space and began meeting in a funeral home. The funeral home, however, proved aesthetically and administratively

problematic. In 1990, Christian Bible located a suitable building in a B district at 83rd and Essex. Alderman Beavers promptly informed Christian Bible that "he would not allow" a church at that location. Consequently, Christian Bible did not apply for a special use permit at this location. In March 1991, Christian Bible purchased property in another B district at 513-23 East 75th Street. The Park Manor Neighbors Association and Alderman Steele both opposed the church's special use permit application. On May 17, 1991, the permit was denied. Christian Bible then unsuccessfully attempted to sell the building for 10 months. In February 1992, Christian Bible renovated the building to enhance its appearance. During these renovations, the church rented space at another location, or held meetings at private homes. Christian Bible later reapplied for a special use permit which was granted on August 20, 1993 with the support of neighbors in the district. Christian Bible now claims the delay in obtaining a special use permit prevented the church from obtaining a real estate tax exemption. The church further alleges that it also paid substantial sums in expenses related to the application process and also suffered a decrease in membership. Christian Bible now owns and meets at a church at 6210 S. St. Louis and has successfully obtained a special use permit to operate the church.

From February, 1988 to December, 1993, Mount Zion rented space in a C district at 4545 North Kedzie. During this period, Mount Zion never applied for a special use permit. In 1990, a City inspector ordered Mount Zion to vacate the building. In April 1993, Mount Zion located suitable rental property at 3949 North Pulaski, and applied for a special use permit. During this process, the Zoning Board informed Mount Zion that the building lacked adequate parking accommodations for a church and both the building and each parking lot would require special use permits. Alderman Wojcik and a neighborhood group also opposed Mount Zion's application. Consequently, Mount Zion withdrew its

application for a special use permit. Mount Zion now owns and meets in a church at 3807 N. Lavergne.

On November 1, 1992, Christian Covenant first rented property in a C district. The owner of the building offered to co-sign a loan enabling Christian Covenant to purchase the property. However, City inspectors ordered Christian Covenant to stop using the building as a church without a special use permit. As a result, Christian Covenant did not purchase the building out of fear the City would not allow the building to be used as a church without a special use permit. Christian Covenant now owns and meets in a church located in an R district.

Between 1990 and 1992, His Word met in the basement of a private home until membership outgrew these accommodations. In 1992, His Word located a suitable building in a C district at 1616 West Pershing. On March 27, 1992, the church signed a purchase contract contingent upon the grant of a special use permit. After filing their special use permit application, His Word met with neighbors in the district who generally supported it. Alderman Patrick Huels stated he would neither support nor oppose the application. On three separate occasions, at the request of Alderman Huels, the Zoning Board postponed a hearing on His Word's application. On October 14, 1992, Alderman Huels introduced an amendment to the Chicago Zoning Ordinance to rezone the property located at 1616 West Pershing from a C district to an M district. After a hearing on December 10, 1992, Alderman William Banks and other aldermen on the Chicago Committee on Zoning of the Chicago City Council voted to recommend approval of the amendment. Both His Word and Citibank, the owner of the building, opposed the rezoning. On December 15, 1992, the Chicago City Council voted to enact the rezoning amendment changing 1616 West Pershing from a C district to an M district. His Word subsequently withdrew its application for a special use

permit; the church spent a considerable sum on filing, attorney's and appraiser's fees. His Word now owns and meets in a church located in an R district.

Plaintiff's Claims and Causes of Action

Plaintiffs' Fourth Amended Complaint contains fourteen counts. Both Plaintiffs and Defendant have filed motions for summary judgment, so for purposes of clarity, the court will address Plaintiffs' counts in clusters. Plaintiff argues (1) the Zoning Ordinance violates the equal protection clauses of the United States and Illinois Constitutions because it treats churches worse than other allegedly similar uses in specific districts (Counts II, VIII)[3]; (2) the process by which zoning legislation is approved by the City Council, and the process by which the ZBA reviews and approves special use applications, deprives Plaintiffs of procedural due process (Count III); (3) the City's Zoning Ordinance violates the first amendment to the United States and Illinois Constitutions because it deprives Plaintiffs of their rights to free exercise of religion, free speech and freedom of assembly (Counts V-VII, IX-XI); (4) the City's Zoning Ordinance violates the Illinois Religious Freedom Restoration Act (IRFRA)(Count XIII); (5) the City's re-zoning of 1616 W. Pershing Road was unconstitutional as to Plaintiff His Word Ministries (Count XII), under a variety of theories; and (6) the City's Zoning Ordinance violates RLUIPA (Count XIV).

SUMMARY JUDGMENT STANDARD

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and

---

[3] To maintain consistent count numbers with prior versions of complaints, Plaintiff intentionally omitted Counts I and IV from the Fourth Amended Complaint.

admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). A dispute about a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

"Summary judgment is appropriately entered against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *McKenzie v. Illinois Dept. of Transp.*, 92 F.3d 473, 479 (7th Cir.1996) (citations omitted). A plaintiff cannot rest on mere allegations of a claim without any significant probative evidence that supports his complaint. *Id.; see First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968). "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-34, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Accordingly, the non-moving party is required to go beyond the pleadings, affidavits, depositions, answers to interrogatories and admissions on file to designate specific facts showing a genuine issue for trial. *Id.* at 324, 106 S.Ct. 2548. Nevertheless, in determining the existence of any genuine issue of material fact, the court must draw all reasonable inferences in the light most favorable to the non-movant. *Bank Leumi Le-Israel, B.M. v. Lee*, 928 F.2d 232, 236 (7th Cir.1991).

ANALYSIS

Equal Protection

Counts II and VIII argue the Zoning Ordinance violates the Equal Protection Clause of the Fourteenth Amendment of the

United States Constitution and Article 1 § 2 of the Illinois Constitution.[4] In particular, Plaintiffs allege the Zoning Ordinance allows similar uses to operate as permitted uses in certain B, C, and M districts, while churches must obtain a special use permit to locate in B and C districts and are prohibited from locating in M districts (e.g. clubs, lodges, community centers, recreation centers, restaurants, theaters and colleges).

The Equal Protection Clause mandates that no state shall "deny to any person within its jurisdiction the equal protection of the laws." This clause is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). "Equal protection limits the power of a legislature to target a particular individual, organization, or group by requiring that the legislature confer benefits or impose costs on a larger, neutrally defined group; it cannot pick on just the most vulnerable." *L C & S, Inc. v. Warren County Area Plan Commission*, 244 F.3d 601, 603 (7th Cir.2001). The Supreme Court has established the appropriate standards for determining the validity of state legislation, e.g. zoning ordinances, under the Equal Protection Clause:

> Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classifications challenged be rationally related to a legitimate state interest.

---

[4] Equal protection challenges brought under the Illinois Constitution are evaluated under the same standards as equal protection claims under the federal constitution. *Nevitt v. Langfelder*, 157 Ill.2d 116, 124, 191 Ill.Dec. 36, 623 N.E.2d 281, 284 (Ill.1993).

City of New Orleans v. Dukes, 427 U.S. 297, 303, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976).

If the legislative classification negatively affects such a suspect class, then courts may uphold the classification only if it is "precisely tailored to serve a compelling governmental interest." *Sklar v. Byrne*, 727 F.2d 633, 636 (7th Cir.1984)(quoting *Plyler v. Doe*, 457 U.S. 202, 216-17, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982)). Absent an invidious or gender-based classification, "[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Cleburne*, 473 U.S. at 440, 105 S.Ct. 3249. Further, this Circuit has interpreted the above and established the particular application of the Equal Protection Clause to municipal land use decisions. "Absent a fundamental right or a suspect class, to demonstrate a viable equal protection claim in the land-use context, the plaintiff must demonstrate governmental action wholly impossible to relate to legitimate governmental objectives." *Forseth v. Village of Sussex*, 199 F.3d 363, 370-71 (7th Cir.2000); *see also Olech v. Village of Willowbrook*, 160 F.3d 386, 387-88 (7th Cir.1998), *aff'd*, 528 U.S. 562, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000); *Esmail v. Macrane*, 53 F.3d 176, 180 (7th Cir.1995); *Unity Ventures v. County of Lake*, 841 F.2d 770, 775 at n. 2 (7th Cir.1988).

First, the Court will address the theory of the present churches constituting a suspect class. While individuals of a particular religious faith may constitute a suspect class requiring heightened scrutiny, there is no proof churches as an entity qualify as a suspect class here. In the context of the Zoning Ordinance, owners of "churches" are operators of the physical structure in which people gather to celebrate and are not a suspect class. *See International Church of the Foursquare Gospel v. City of Chicago Heights*, 955 F.Supp. 878, 881 (N.D.Ill.1996) (zoning ordinance excluding

churches from B districts was rational and survived equal protection challenge); *see also Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 471-72 and fn. 13 (8th Cir. 1991)(classification of churches for land use planning was not analogous to classification based upon the "religious status" of the faithful; zoning ordinance controlling the location of churches was properly evaluated under the rational basis test); *KDM v. Reedsport School District*, 196 F.3d 1046, 1051-52 (9th Cir.1999)("parochial school students are not a suspect class."). While this conclusion is a narrow distinction, it is an important distinction, because a classification based upon the religious preferences of an individual may trigger heightened scrutiny but a classification that merely touches upon religion in general is subject to the standard rational basis equal protection review.

Second, the Zoning Ordinance at issue does not infringe upon a fundamental right to trigger heightened scrutiny. In order to raise the equal protection analysis to heightened scrutiny under the fundamental rights theory, a challenged ordinance must produce "grave interference with important religious tenents" or "affirmatively compel [church members] to perform acts undeniably at odds with fundamental tenents of their religious beliefs." *Griffin High School v. Illinois High School Assoc.*, 822 F.2d 671, 674 (7th Cir.1987)(rule that made it more difficult for student-athletes to transfer to private, religious schools did not infringe upon the free exercise of religion and merited the standard rational basis scrutiny). Here, the Zoning Ordinance cannot be reasonably interpreted to regulate religious beliefs or compel individuals to perform any acts. Rather, the Zoning Ordinance simply limits the location of church buildings, which is not the regulation of belief, any more than regulating the location of the *Chicago Tribune* building is the regulation of the newspaper's first amendment-protected product. The City has the responsibility to create and implement a land use plan for the city as a whole and supervising the location of churches in

this regard is clearly distinguishable from regulating an individual's right to pray, worship or celebrate. Plaintiffs' claims of a suspect class and a fundamental right[5] fail to prove the need for heightened scrutiny and instead merit an equal protection review under the traditional rational basis standard.

Under the rational basis inquiry, the amended Zoning Ordinance as a whole passes the rational basis test. As a preliminary matter, the division of municipal land into various districts and the prohibition of certain uses from each district is a common and accepted practice. *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926)(affirming zoning plan that divided town into use districts and prevented land owner from using property in preferred manner). Further, government has a valid public policy motive in proper urban planning. "A city may use zoning regulations as an exercise of the police power to protect residents from the ill effects of urbanization, such as crowding, encroachment of commercial businesses or industries, traffic congestion, and noise." *Cohen v. City of Des Plaines*, 8 F.3d 484, 494 (7th Cir.1993). *See also L C & S, Inc.*, 2001 WL 294312.

In the present case, the City's Zoning Ordinance addresses these goals. By authorizing churches to operate in R districts as a permitted use of right, the City recognizes the historical connection between strong and healthy residential communities and churches. Outside these residential districts, though, the City reasonably maintains churches are less suited to B and C districts, since the goals of these districts to

---

[5] Furthermore, in the present case, many of the individual church Plaintiffs are corporations, and it is well established that corporations lack fundamental rights. "Corporations do not have fundamental rights; they do not have liberty interests, period." *Mid-American Waste Sys., Inc. v. City of Gary, Ind.*, 49 F.3d 286, 291 (7th Cir.1995).

promote business and commerce may be hurt by such non-commercial uses. *International Church of the Foursquare Gospel*, 955 F.Supp. at 881. Such broad generalizations may not always be helpful, so the City recognizes exceptions to this general rule. The Ordinance contains a mechanism to allows churches to obtain special use permits to operate in B and C districts.[6] However, in B and C districts, the quarrel between churches and industrial uses might be so significant that the City could rationally conclude the two uses cannot share the area. From the perspective of community management, there are clear economic and social justifications for the City's overall zoning scheme, and these reasons have nothing to do with religion. *Cf. Concerned Citizens of Carderock v. Hubbard*, 84 F.Supp.2d 668, 671-73 (D.Md.2000)(zoning ordinance that permitted churches to operate as of right in a residential district, but required "private clubs" and other allegedly similar uses to obtain a special use permit, did not violate the Establishment Clause; the zoning scheme was motivated by a legitimate secular purpose, i.e. "development which is harmonious and compatible with single family residential use."). Thus, the City's decision to more extensively regulate churches in B, C, and M districts than in R districts is rational.

As stated above, the City's zoning scheme must be viewed as a whole, with attention focused as to how the pieces combine to form the complete zoning scheme. Pursuant to the February 2000 amendments to the Zoning Ordinance[7], most

---

[6] Apparently, this mechanism has worked in at least a small fashion, since Plaintiffs Christ Center and Christian Bible Center obtained special uses permits for their current churches.

[7] Plaintiffs argue the fact the City amended the Zoning Ordinances in response to its claims proves the unfairness of the Ordinances; however, this litigation "operated as a wake-up call" to the City and the City "cannot be criticized for having taken a long time to wake up to the need to" adjust and adapt the Ordinances to treat uses differently to reflect the resources and needs of an area. *L C & S, Inc.*, 2001 WL 294312, at *5.

of the uses allegedly similar to churches receive the same treatment.[8] With respect to the remaining allegedly similar uses (e.g.restaurants, taverns, theaters), these uses have a commercial character that differentiates them from churches and makes them a better fit with other uses allowed in B and C districts. The City could determine reasonably that uses cited by Plaintiffs have an industrial character that separates them from churches and makes those uses more appropriate for the industrial districts. *International Church of the Foursquare Gospel*, 955 F.Supp. at 881. Thus, as it pertains to churches, the Zoning Ordinance is rationally related to a legitimate governmental purpose and survives equal protection analysis.

Due Process

Count III appears to challenge the "procedures" by which the City Council zones or re-zones land and the standards used by the ZBA to determine whether to issue a special use permit. However, the court finds it difficult to determine what types of due process claims Plaintiffs have alleged, i.e., whether Plaintiffs are mounting a facial challenge to the Zoning Ordinance or merely complaining of the its [sic] procedures, or both. Apparently, Plaintiffs' second amended complaint clarified Plaintiffs' initial claims somewhat in this regard, *CLUB IV*, 1997 WL 94731, at *2, but Plaintiffs' fourth amended complaint is still unclear. This court will presume Plaintiffs' attack is both a facial challenge to the zoning scheme as a whole and a challenge to the City Council and ZBA's procedures.

---

[8] *CLUB I, II, III, IV* and *V* refer to the treatment of churches and similar uses under the old ordinance and under a different standard of review; the amendments adjusted and aligned the uses and districts and thus the factual analyses under these past opinions are of questionable value.

In order to assert a due process claim, a plaintiff must demonstrate a "legitimate claim of entitlement" to the right asserted. *See Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *New Burnham Prairie Homes v. Village of Burnham*, 910 F.2d 1474, 1479 (7th Cir.1990). The Seventh Circuit has recognized the liberty to use one's land as one desires is such a property right within the meaning of due process. *See River Park, Inc. v. City of Highland Park*, 23 F.3d 164 (7th Cir.1994). Further, when the right to use property is affected by an administrative decision, e.g. the denial of a special use permit, a "deprivation" of constitutional rights is at issue and procedural due process is warranted. *Id.* at 166.

The procedures "due" in zoning cases are minimal. *Id.* (citing *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 96 S.Ct. 2358, 49 L.Ed.2d 132 (1976)). "Federal courts are not boards of zoning appeals." *Id;. New Burnham Prairie Homes*, 910 F.2d at 1481; *Estate of Himelstein v. City of Fort Wayne, Ind.*, 898 F.2d 573, 578 (7th Cir.1990). As to the City Council's legislative enactments and the ZBA's processes, the law is clear that the procedures by which these legislative bodies enact legislation provides all the process that is due. *River Park*, 23 F.3d at 166. Municipalities are not required to use adjudicative procedures to make zoning decisions, but may elect to use the political process with no hearings of any kind. *River Park*, 23 F.3d at 166 (citing *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 467-68 (7th Cir.1988)). " 'Legislative due process' seems almost an oxymoron." *LC & S*, 2001 WL 294312, at *1. Because the due process clause permits municipalities to use political methods to decide zoning cases, "the only procedural rules at stake are those local law provides, and these rules must be vindicated in local courts." *River Park*, 23 F.3d at 167. Thus, parties contesting that "state or local regulation of the use of land has gone overbroad must repair to state court." *Id.* Further, the Zoning Ordinance explicitly provides for the

review of zoning decisions by the Illinois Circuit Courts. *See Chicago Zoning Ordinance* § 11.3-4; 65 ILCS 5/11-13-13; 735 ILCS 5/3-104.[9] Therefore, Plaintiffs' claim the Zoning Ordinance fails to provide adequate due process as required by the due process clause of the Fourteenth Amendment is rejected.

First Amendment Claims

Plaintiffs' Counts V, VI, VII, IX, X and XI allege the Zoning Ordinance violates churches' First Amendment rights as to free exercise of religion, freedom of speech and freedom of assembly.

Free Exercise

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. Const., amend. I (1791). As applied to the states by the Fourteenth Amendment, the free exercise clause prohibits local governments from making discretionary (i.e., not neutral, not generally applicable) decisions that burden the free exercise of religion, absent some compelling governmental interest. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S 520, 531, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993); *Cantwell v. State of Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 84 L.Ed. 1213 (1940)(applying free exercise clause to the states). Land use regulation often

---

[9] In evaluating the facts before it when it ruled on the motion to dismiss in *CLUB I*, the court interpreted the present matter as an extraordinary zoning matter, with a remedy laying beyond state court. However, since Plaintiffs challenge the "vague" zoning standards and procedures, such an attack is one that might be presented by any property owner seeking a special use permit, i.e. it is a claim focused on property rights rather than any particular use or "fundamental liberty." Thus, it is a claim that attacks a procedural rule and may be raised in state court. *River Park*, 23 F.3d at 167.

involves "individualized governmental assessment of the reasons for the relevant conduct," thus triggering *City of Hialeah* scrutiny. *Id.* at 537, 113 S.Ct. 2217. For example, local officials may be asked to determine whether the historic preservation of a district outweighs the financial interests of a specific parcel owner. *Keeler v. Mayor & City Council of Cumberland*, 940 F.Supp. 879, 886 (D.Md.1996). Thus, zoning is a common source of tension between religious organizations and local authorities, and sends many churches (temples, synagogues or mosques) to the courthouse.[10]

Modern free exercise claims are controlled by the seminal cases *Employment Div., Dept. of Human Resources of Oregon v. Smith* and *City of Hialeah*[11]. Under *Smith*, "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *City of Hialeah*, 508 U.S. at 531, 113 S.Ct. 2217. Under *City of Hialeah*, a law is not "neutral" if "the *object* of [the] law is to infringe upon or restrict practices *because* of their religious motivation." *Id.* at 533, 113 S.Ct. 2217 (emphasis added). A substantial burden exists when the government pressures a plaintiff to modify her behavior and violate her beliefs, *Jolly v. Coughlin*, 76 F.3d 468, 477 (2nd

---

[10] *See e.g., Love Church v. City of Evanston*, 896 F.2d 1082 (7th Cir.1990); *Biblia Abierta*, 129 F.3d 899; *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464 (8th Cir.1991); *Christian Gospel Church, Inc. v. City and County of San Francisco*, 896 F.2d 1221 (9th Cir.1990); *First Assembly of God of Naples, Florida, Inc. v. Collier County, Florida*, 20 F.3d 419 (11th Cir.1994); *Boyajian v. Gatzunis*, 212 F.3d 1 (1st Cir.2000); *Daytona Rescue Mission, Inc. v. City of Daytona Beach*, 885 F.Supp. 1554 (M.D.Fla.1995); *St. Paul's Protestant Episcopal Church v. City of Oakwood*, 1998 WL 1657172 (S.D.Ohio 1998); *Al-Salam Mosque Foundation v. City of Palos Heights*, No. 00 C 4596, 2001 WL 204772 (N.D.Ill. March 1, 2001).

[11] The court will address the applicability of the recently passed Religious Land Use and Institutionalized Persons Act below.

Cir.1996), by, for example, discriminating against her because of her religious belief, inhibiting her dissemination of particular religious views or pressuring her to forgo a religious practice. *Battles v. Anne Arundel Co. Bd. of Educ.*, 904 F.Supp. 471, 477 (D.Md.1995). In the present case, the Zoning Ordinance as a whole and the special use provisions are neutral, generally applicable laws. First, these laws are neutral because the object of the Zoning Ordinance and special use provisions is to regulate land use and development. The record fails to support Plaintiff's argument that the Zoning Ordinance was enacted with the purpose of suppressing the celebration of religion in Chicago. As stated above, any burdens on the use of property were and are motivated by a legitimate concern for the health and safety of Chicagoans and the economic development of Chicago. *See Cornerstone Bible Church*, 948 F.2d at 472. Moreover, the Zoning Ordinance is generally applicable since it does not "impose burdens only on conduct motivated by religious belief," i.e. the use regulations impact or "burden" all land owners within the City who seek a special use permit. *Id.* at 543, 113 S.Ct. 2217; *see International Church of the Foursquare Gospel*, 955 F.Supp. at 880. Plaintiffs maintain they have suffered hardship and inconvenience in their attempts to secure a location in which to celebrate their faith. For example, Plaintiffs argue the Zoning Ordinance process is an economic hardship on smaller churches because these churches lack the funds and resources to apply for and receive a permit. Must the City waive the application fees for churches? Must the municipality provide free legal services to churches? Must the government expedite special use permit applications filed by churches?[12] The answer is no, because

[12] The amended special use provisions automatically approve applications submitted by a church if no action is taken on the application within 120 days, so the provisions arguably serve to expedite churches' applications.

such obstacles face all similarly situated applicants. As the Seventh Circuit stated, "[W]hatever specific difficulties [the church] claims to have encountered, they are the same ones that face all rentors, not merely churches. The harsh reality of the marketplace sometimes dictates that certain facilities are not available to those who desire them." *Love Church*, 896 F.2d at 1086. The "burden," i.e. the requirement that an individual must go through the processes and meet the standards, is a requirement imposed on all special use applicants, regardless of the character of the proposed use. Therefore, the Zoning Ordinance and related provisions are valid neutral and generally applicable zoning regulations that impose no substantial burden to the free exercise of religion.

Freedom of Speech and Assembly

Plaintiffs base their free speech and assembly claims on the presumption that the Zoning Ordinance implicates these First Amendment clauses by limiting the location of churches in the City. The First Amendment protections as to speech and assembly are not so all-encompassing as to include all activity in which an idea, goal or value is promoted. Zoning restrictions that have an incidental effect on the ability of people to congregate as they desire are subject to rational basis scrutiny. *See Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974). Here, Plaintiffs argue they are entitled to heightened scrutiny because they engage in religious speech.[13] However, the operation of a

[13] Plaintiffs allege "plaintiff churches are 'merchants', businesses with a spiritual rather than a physical product." (Pl. Compl. at 10; Pl. Resp. Def. Mot. Summ. J. at 10). Commercial speech has traditionally been accorded fewer First Amendment protections than non-commercial speech. *See generally Central Hudson Gas v. Public Service Commission*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980); *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995). If the court were

house of worship does not equate with "religious speech," any more than the operation of a shoe store equates with commercial speech. *There to Care, Inc. v. Comm'r of Indiana Dept. of Revenue*, 19 F.3d 1165 (7th Cir.1994). The operation of a business, including a charitable business, is subject to zoning laws, even if the business makes its money by engaging in conduct within the core of the First Amendment. *Id.* at 1167. When the object of the law is unrelated to expression, e.g. harmonious land use here, the free speech clause is not implicated, even if the law in question limits the ability to disseminate one's message. *Id.* at 1168. For the above reasons, Plaintiff's First Amendments claims are rejected.

Illinois Religious Freedom Restoration Act

As the court is granting summary judgment to the City on Plaintiffs' federal claims, the court dismisses Count XIII pursuant to 28 U.S.C. § 1367(c). *See Groce v. Eli Lilly & Co.*, 193 F.3d 496, 501 (7th Cir.1999)("[I]t is the well-established law of this circuit that the usual practice is to dismiss without prejudice state supplemental claims whenever all federal claims have been dismissed prior to trial.") In light of the Illinois Supreme Court's recent ruling on this novel and complex state law, this court dismisses the claim arising from the Illinois Religious Freedom Restoration Act. *City of Chicago Heights v. Living Word Outreach Full Gospel Church*, 196 Ill.2d 1, 255 Ill.Dec. 434, 749 N.E.2d 916 (2001).

---

to apply the accepted law of commercial speech to Plaintiffs' comments, Plaintiffs would lose, rather than gain, First Amendment protections.

Re-zoning of 1616 West Pershing Road

In Count XII, Plaintiff His Word Ministries to All Nations ("His Word") maintains it had a contingent option to purchase 1616 W. Pershing, but that the re-zoning of the property violated His Word's constitutional rights, specifically Plaintiff's free exercise protection, federal equal protection and federal procedural due process.

His Word's procedural due process argument was addressed above and in the Seventh Circuit's *Biblia Abierta* opinion. Under the law of the case, the re-zoning of 1616 W. Pershing was a legislative act. *Biblia Abierta*, 129 F.3d at 904-05. Thus, the legislative process provided the procedural due process and His Word is entitled to no more.[14] Similarly, His Word's free exercise claim is controlled by *Biblia Abierta*, where the Seventh Circuit ruled "[i]n passing the ordinances, the Zoning Committee and the City Council created neutral, prospective rules that apply to all current and future owners of the property." *Id.* at 904. Since *Smith* and *City of Hialeah* hold there can be no free exercise claim if the law at issue is neutral and generally applicable, His Word's free exercise claim is dismissed. Further, since His Word's first amendment claim is dismissed, Plaintiff's federal equal protection claim is generic and subject to rational basis scrutiny. *See Coniston*, 844 F.2d at 467-68; *Biblia Abierta*, 129 F.3d at 904. The reasons for the re-zoning are rationally related to the City's interests in developing commercial areas and minimizing land use conflicts: prior to the re-zoning of

---

[14] While the conduct of certain individuals (e.g. Huels) may be egregious and may even have risen to the level of dishonorable, the system in which they operate is not unconstitutional and is acceptable under a rational basis test. "That the plaintiffs were the target, and so far as appears the only target, of the amendment is plain . . . But this does not establish that the amendment was not a bona fide legislative measure. It is utterly commonplace for legislation to be incited by concern over one person or organization." *L C & S*, 244 F.3d 601, 604.

1616 W. Pershing, all four corners of Ashland and Pershing were zoned M and the majority of the property extending from the corners was zoned M. Thus, the re-zoning of 1616 W. Pershing to M passes the rational basis test.

Religious Land Use and Institutionalized Persons Act

Plaintiffs amended their complaint to include Count XIV, a claim under the recently passed Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C.A. § 2000cc et seq. "The concept of a religious freedom restoration act began as the congressional response to the much-criticized Supreme Court decision in *Employment Division, Department of Human Resources v. Smith.*" Mary Jean Dolan, The Constitutional flaws in the New Illinois Religious Freedom Restoration Act: Why RFRAs Don't Work, 31 Loy.U.Chi.L.J. 153, 153-154 (2000).[15] The federal Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb to 2000bb-4 (1994), like its state counterparts, sought to rescind *Smith* and restore what proponents refer to as the pre-*Smith* standard: the "compelling interest/least restrictive means" test found in *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). In 1997, the Supreme Court struck down the RFRA in *City of Boerne v. Flores*, primarily on federalism grounds. *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997). The Court held Congress lacked the power under the Enforcement Clause of the Fourteenth Amendment to change the meaning of the First Amendment. Last year, Congress responded with RLUIPA, a law similar to RFRA.

---

[15] An inadvertent oversight in an earlier opinion omitted a citation to Ms. Dolan and failed to recognize her helpful analysis. The Court appreciates her contribution and insight on these issues.

Assuming that RLUIPA is constitutional, it does not effect the outcome, because RLUIPA is inapplicable to the present matter by its own terms. As stated above, the City amended its Zoning Ordinance in February 2000 and adjusted its policies concerning special use permits and related districts. By removing any potential substantial burden, the City has avoided the threat of heightened scrutiny under RLUIPA.[16] 42 U.S.C.A. § 2000(5)(e). Thus, Defendant's motion for summary judgment on Count XIV is granted.

CONCLUSION

For the foregoing reasons, Defendants' motions for summary judgment are GRANTED and Plaintiffs' motion for summary judgment is DENIED. IT IS SO ORDERED.

---

[16] (e) Governmental discretion in alleviating burdens on religious exercise:

> A government may avoid the preemptive force of any provision of this chapter by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.

APPENDIX D

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

No. 01-4030
No. 94 C 6151

November 26, 2003

CIVIL LIBERTIES FOR URBAN BELIEVERS, CHRIST CENTER, CHRISTIAN COVENANT, OUTREACH CHURCH, et al.,
Plaintiffs-Appellants,

v.

CITY OF CHICAGO,
Defendant- Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

ORDER

Before Hon. William J. Bauer, *Circuit Judge*, Hon. Richard A. Posner, *Circuit Judge*, Hon. Terence T. Evans, *Circuit Judge*

William J. Hibbler, *Judge.*

On September 3, 2003, plaintiffs-appellants filed a petition for rehearing *en banc* in connection with the above-referenced case. On October 8, 2003, a petition for rehearing

of intervenor the United States and answer to appellants' petition for rehearing *en banc* was filed and on October 27, 2003, a consolidated answer to petition for rehearing was filed by the city of Chicago. No judge in active service has requested a vote on the petition for rehearing *en banc* and all of the judges on the original panel have voted to deny rehearing *en banc.* It is, therefore, ORDERED that the petition for rehearing *en banc* is DENIED.

APPENDIX E

CONSTITUTIONAL PROVISIONS

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX F

STATUTORY PROVISION

42 U.S.C. § 2000cc. Protection of land use as religious exercise

(a) Substantial burdens

(1) General rule

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

(2) Scope of application

This subsection applies in any case in which—

(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make,

individualized assessments of the proposed uses for the property involved.

(b) Discrimination and exclusion

(1) Equal terms

No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

(2) Nondiscrimination

No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

(3) Exclusions and limits

No government shall impose or implement a land use regulation that—

(A) totally excludes religious assemblies from a jurisdiction; or

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

(Pub. L. 106-274, § 2, Sept. 22, 2000, 114 Stat. 803.)